

# **Insolvency and Restructuring Proceedings in Argentina**

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## **I - Country Overview**

Located at the extreme south-east of the South American continent, Argentina is the eighth largest country in the world, the second largest in Latin America and has a population of approximately 37 million people.

The Republic of Argentina is comprised of 23 provinces and the federal capital: the Autonomous City of Buenos Aires. Argentina is organized as a federal republic with a democratic political system. The Argentine Constitution, adopted in 1853, provides in its present form for a tripartite system of government consisting of an executive branch headed by the President, a legislative branch and a judiciary. Each province also enacts its own Constitution, elects its own governor and legislators, and appoints its own judges to the provincial courts. The judicial system is divided into federal and provincial courts, and each system has lower courts, courts of appeal and supreme courts.

The National Constitution entitles congress to enact Codes concerning civil, commercial, criminal, mining, labor and social security matters, which are applicable throughout the country. The Civil Code, the Commercial Code (which includes the Companies Law and the Bankruptcy Law) apply therefore in all cases.

The judicial procedure, however, is governed by the federal or provincial procedure law that applies to each jurisdiction. For purposes of simplicity, we refer below to the provisions of the National Civil and Commercial Procedure Code (the “Code of Procedure”) that applies to proceedings followed before the courts of the City of Buenos Aires. However, it must be noted that federal and provincial procedural laws differ.

## **II - Securities and Priorities**

### **2.1. Secured Credits**

Security interests under Argentine law may be obtained through mortgages, pledges (including registered and floating pledges), security assignments and trusts. Security may be taken over a wide variety of property, such as movable and immovable property, securities, shares, cash and receivables.

#### ***(a) Mortgages***

A mortgage may be established over real estate, ships and aircraft. A mortgage will generally secure the principal amount, accrued interest, and other related expenses owed by a debtor to the creditor. All mortgages must be registered in the relevant registry in order to become binding upon third parties. Mortgaged property may remain in the mortgagor’s (i.e., its owner’s) possession. Mortgages grant the registered mortgagee a first priority right over the underlying asset. Foreclosure of a mortgage is effected

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through a special summary proceeding which provides for the sale of the property through a public auction.

***(b) Pledges***

Under the provisions of the Civil Code, the pledged asset must be delivered to the creditor or placed in the custody of a third party. If the debtor defaults on the secured debt, the creditor can sell the pledged asset through a court auction but, in principle, may not obtain ownership of the asset. The creditor who has a pledge over an asset has a priority right to the proceeds of sale of the asset.

The Commercial Code governs "commercial pledges". These are defined as pledges of chattels to be used as collateral for commercial obligations. The main difference between a civil and a commercial pledge is that in a commercial pledge some creditors are entitled to a private sale, i.e., an out-of-court foreclosure. The Commercial Code provides that unless the debtor and creditor agree on a special sale proceeding, the pledged asset must be sold by public auction.

Argentine law also contemplates the creation of "registered pledges" that allow the pledged asset to remain in the debtor's possession. Such pledges must be registered with the Registry of Pledges of the jurisdiction where the assets are located (fixed pledges) or where the debtor is domiciled (floating pledges). The pledge becomes binding on third parties upon registration.

Pledges on shares or other securities may also be granted. In the case of shares, the pledge becomes binding on the company and third parties from the date it is registered in the corporate stock ledger. If the shares or securities are traded in stock markets, they may be sold through a stock broker.

***(c) Trusts***

Trusts may be used as a means of taking security over most forms of movable and immovable assets. Goods held in trust form a separate estate from the estates of the trustee and the settlor, and therefore will not be affected by any individual or joint actions brought by the trustee's or settlor's creditors, except in the case of fraud by the settlor. The beneficiary's creditors may exercise their rights over the proceeds of the goods held in trust and be subrogated to the beneficiary's rights. The form of sale of the goods held in trust should be provided under the trust agreement. Enforcement proceedings in trusts are generally faster and cheaper than those used to enforce a pledge or a mortgage.

***(d) Security assignments***

Security assignments are typically limited to a means of taking security over rights or credits, including, without limitation, receivables. The treatment of security assignments in the case of bankruptcy of the debtor has been the subject of legal debate. Certain scholars and case law have held that in such cases the security assignment should be treated as a pledge. While such characterization does not invalidate the security, it implies a somewhat lengthier proceeding for foreclosing the secured asset.

## **2.2. Preferred Credits in the event of bankruptcy**

The Bankruptcy Law provides two types of preferences: (a) special preferences, which are granted exclusively over certain specific assets of the debtor; and (b) general preferences, which are granted over all the debtor's assets.

Some special preferences, in order of decreasing priority, are: (i) construction, improvement or maintenance expenses related to assets that continue to be in the debtor's possession; (ii) salaries and compensation of workers over the proceeds of the sale of merchandise, raw material and machines located in the debtor's premises; (iii) specific taxes and duties due on the asset to which such tax applies; and (iv) mortgages and pledges over the proceeds of the sale of the mortgaged or pledged asset.

Some general preferences, in order of decreasing priority, are: (i) labour credits not subject to a special preference; (ii) the principal amount of social security debts; (iii) funeral, medical and certain personal expenses of individuals; and (iv) the principal amount of any taxes and duties due. General preferences may not exceed more than 50% of the total assets of the debtor. Unless the debt(s) is/are subordinated, unsecured creditors will be paid on a *pari passu* basis.

## **2.3. Invalid Acts performed during the Suspicion Period**

Certain acts performed by the debtor within a "suspicion period" are declared not binding on creditors without the need of express action or petition or any further procedures. These are: (i) gratuitous acts; (ii) advance payments of debts falling due, according to the relevant title, on the day of the bankruptcy or later; (iii) the creation of mortgages, pledges or any other preferences, with respect to immature obligations which originally were not covered by such security.

The "suspicion period" commences from the date that the debtor entered into a "suspension of payments", as determined by the court.

Other acts prejudicial to the interests of the creditors performed within the suspicion period may be declared not binding on creditors, if those acting with the bankrupt company had knowledge of its suspension of payments. The affected third party has the burden of proving that the act did not cause any loss to the bankrupt company.

The ineffectiveness of an act based on fraud between the third party and the debtor may also be declared under the Civil Code.

## **III - Credit collection litigation procedures**

### **3.1. Precautionary measures**

Under the Code of Procedure, any creditor of claims that are due and payable could request the attachment of assets, v.g.. the collection accounts opened in banks. They could also request the attachment of other personal or real property held by the debtor, or other precautionary measures such as an injunction.

Such actions will be requested and ordered without the intervention or knowledge of the debtor, who would become aware of the relevant action once it is made effective.

Precautionary measures have the following features:

- (i) They are issued *inaudita parte*: the Judge's knowledge is based on facts unilaterally affirmed and evidenced by the applicant.
- (ii) They are provisional: the decree that imposes a precautionary measure is not final. It can always be changed, and the measure may be substituted, reduced, extended, modified or released.
- (iii) They are accessory: they have no intrinsic purpose, but are ancillary to a main process; therefore their existence depends on the contingencies of the process.

The prerequisites for granting a precautionary measure are thus the following:

- (i) Likelihood of success: If the applicant of a precautionary measure evidences that the right invoked by him is authentic (*verosimil*) the Judge would grant the measure without judging upon the substance of the matter.
- (ii) Danger in delay: Its aim is to prevent the judicial ruling acknowledging such party's rights from arriving too late to enforce the ultimate decision.
- (iii) Counter-bond: As a general rule, the applicant of a precautionary measure must secure the damages that would be caused if it were not legally entitled to request such measure.

Once these legal requirements for eligibility are satisfied by the person requesting the injunction, obtaining the precautionary measure should not take longer than one week.

The resolution that orders the enforcement of the precautionary measure can be challenged before a lower or appellate court. It could take up to three months until the ruling (that upholds or rejects the precautionary measure) becomes final. In the meantime the injunction remains in effect.

### **3.2. Executory proceedings**

Under the Code of Procedure all creditors with claims documented by means of instruments that give rise to execution may file executory actions against the debtor.

The executory trial can be divided in three main stages. The first one encompasses the filing of a complaint, the payment request, the attachment and the summons for defense. The second stage consists of the filing by the debtor of the response to the complaint and few defenses (such as lack of competence, lack of right (*legitimación*), payment, defects in title, set off or *res iudicata*), the production of very limited evidence, the court order for auction (writ of execution) and any appeals. The final stage consists of the proceedings required to enforce the auction order.

The average term of duration of executory procedures filed with the commercial courts of the City of Buenos Aires is of three to five months, depending on the court; it is necessary to add to such period the time taken in the execution of the judgement.

### **3.4. Ordinary proceedings**

Ordinary proceedings are fact-finding processes which allow for the exhaustive analysis of the dispute, do not pose limits to the defences that a debtor may present and allow the production of all necessary pieces of evidence.

Depending on the development of the process, its approximate duration is from two to three years, taking into account first and second instance. Additionally, the proceedings before the Supreme Court, if applicable, could take about six months to one year.

For this kind of legal actions any kind of evidence may be offered and submitted in connection with the subject-matter of litigation.

In these proceedings, except for special situations, it is difficult to enforce precautionary measures. The legal limitations now in force mentioned above are applicable to the exceptional cases in which it is possible to enforce such measures.

### **3.5. Arbitration.**

Creditors may also claim their credits through arbitration if the relevant agreement includes an arbitration clause, or if arbitration is agreed later. Arbitration proceedings tend to be more flexible and faster than ordinary proceedings. The award is generally not subject to appeal and remains confidential.

### **3.6. Petitions for bankruptcy**

Any creditor whose claim is instrumented by means of an executory title (checks, promissory notes, bills of exchange, final judgments that order the payment of sums of money) could file petitions for bankruptcy.

### **3.7. Mediation**

Argentine law No. 24,573 has established compulsory mediation. This proceeding provides direct communication among the parties for the solution of the dispute out of court. The compulsory mediation proceeding does not apply, among others, to bankruptcy proceedings, executory trials or recognition of foreign judgment proceedings.

## **IV - Restructuring and Insolvency Proceedings**

### **4.1. Out of Court Restructuring Agreements - Exchange Offers**

The debtor may enter into a restructuring agreement with all or part of its creditors applying exclusively the contractual terms of its debt obligations, without undergoing any of the procedures provided under the Bankruptcy Law (as defined below).

If the restructured debt includes publicly offered notes or other securities, the debtor would generally conduct an exchange of its outstanding notes for new notes that would reflect the terms of the restructuring.

Direct exchange offers of publicly offered notes raise, among others, the following issues:

- (i) The exchange is a voluntary process. Bondholders are not forced to accept the exchange offer, nor are the terms of the new notes enforceable against them. Therefore, the “holdouts” who do not tender their notes will preserve their rights to bring legal actions against the Company under the old notes, including the right to petition for involuntary bankruptcy.
- (ii) The exchange process is governed by applicable securities laws, including the regulations of the Argentine *Comision Nacional de Valores*, the Buenos Aires Stock Exchange and/or other applicable stock exchange or over the counter market in which the securities may be listed, and the regulations of the US Securities and Exchange Commission if the securities are registered in the USA.
- (iii) The exchange process requires the preparation of disclosure documents describing the terms of the exchange offer, including an information memorandum and other documents required by securities regulations.
- (iv) In the event the restructured notes are *obligaciones negociables* issued under Law 23,576, as amended, or certificates issued under an Argentine trust created under Law 24,441, careful attention must be paid to the structuring of the exchange to preserve applicable tax exemptions. The same applies in the event the restructuring is implemented under an APE procedure (as defined below).

#### **4.2. Bankruptcy Law Procedures**

The main insolvency proceedings provided under the Argentine Bankruptcy Law 24,522, as amended by Laws 25,563 and 25,589 (the "Bankruptcy Law") are: (i) the “*acuerdo preventivo extrajudicial*” procedure or “APE” (Out-of Court Reorganization Procedure), (ii) the “*concurso preventivo*”, (iii) the *special bidding process*, and (iv) bankruptcy.

Any company can enter into one of these proceedings provided under the Bankruptcy Law, with the exception of companies involved in certain activities, such as banks and insurance companies, who are required to follow special insolvency proceedings.

#### **4.2.1 Acuerdo Preventivo Extrajudicial (APE)**

The APE is a procedure by which an out-of court restructuring agreement entered into by the debtor and a majority of unsecured creditors required by the Bankruptcy Law is submitted by the debtor to an Argentine court to make such restructuring agreement enforceable against all unsecured creditors of the debtor upon court approval (“*homologación*”).

The restructuring proposal generally comprises all unsecured debt obligations. Once the restructuring agreement is executed by the Required Majorities (as defined below), the debtor files the executed restructuring agreement with the court and initiates the APE. The petitioner must show the company is suffering general economic or financial difficulties. Such difficulties are not required necessarily to represent insolvency or a “suspension of payments” status. The documentation to be filed shall include documentation referred to the financial situation of the debtor, including among others, a statement of assets and liabilities, a list of creditors and the amount of capital and percentage of debt represented by the creditors who have signed the APE.

The majorities of unsecured creditors that must consent to the restructuring agreement for the APE to proceed are as follows: (1) the absolute majority (more than 50%) of all unsecured creditors, determined on a head count basis, and (2) at least two thirds (66 2/3%) of the aggregate principal amount of such unsecured debts (the “Required Majorities”). Unsecured creditors that are also controlling shareholders of the company are not taken into account when determining the number of creditors required to consent to the APE or the amount of outstanding unsecured debts of the company.

The court should not conduct a substantive review of the APE proposal. The non consenting creditors may oppose the court endorsement based only on grounds of omissions or exaggerations of the assets or liabilities or the absence of the consent of the Required Majorities. If the oppositions, if any, are resolved and the Required Majorities and legal requirements have been complied with, the court should endorse the APE.

The effects of the restructuring agreement that undergoes an APE procedure can be divided in three different stages: (i) effects as of execution of the agreement, (ii) effects as of filing the APE before the relevant court, and (iii) effects as of court approval.

The restructuring agreement becomes binding on the signatory parties as of the execution date, and shall be effective among them in accordance with its terms. In practice, restructuring agreements generally provide a series of conditions precedent that must be complied with prior to effectiveness, including a minimum threshold of consenting creditors that must consent to the agreement.

Filing of the APE before the relevant Court, provided the Required Majorities have been met and other requirements of the Bankruptcy Law have been complied with, among others shall have the following effects:

- (i) all actions to enforce claims against the debtor which are not secured by a pledge or mortgage are stayed;
- (ii) the commencement of similar actions against the debtor are prohibited; and

(iii) the accrual of interest on outstanding debt continues to accrue.

Upon court approval, the restructuring agreement terms become effective against all unsecured creditors, including those that did not consent or expressly objected it.

Given that the APE procedure as currently implemented became effective in May 2002, to date there have been few significant court rulings regarding APEs. The procedure on average takes between 6 and 18 months depending on the volume and nature of debts being renegotiated and the size of the debtor. It should be noted that if part of the debt is represented by securities that have been publicly offered, noteholders meetings could be required to be called to consent the APE, which would make the process longer.

#### **4.2.2. Concurso Preventivo**

The *concurso preventivo* is a judicial insolvency proceeding initiated by a debtor to restructure its outstanding debts. The *concurso* is similar to the Chapter 11 proceedings under the U.S. Bankruptcy Code.

When two or more corporations, or even natural persons, form part of a business group on a permanent basis, they may jointly file a *concurso* in respect to them.

Only the debtor can commence a *concurso* proceeding, either by initiating the *concurso* directly or by converting an involuntary bankruptcy petition filed by a creditor against it into a *concurso*.

To initiate the *concurso* the petitioner must show the company is insolvent or has entered into a “suspension of payments” status. The petitioner is required to file with the court, among others, corporate by-laws and records, an explanation of the express causes of the debtors financial condition, specifying the date it became unable to pay its debts, a detailed and valued statement of assets and liabilities with an opinion of a certified public accountant, financial statements and a list of creditors including a dossier for each creditor containing a copy of the documents evidencing the reported debt.

Upon the commencement of the *concurso*, the court will appoint a receiver (locally known as *sindico*), who is an individual randomly selected from a list maintained by the court, generally comprising local accountants. The *sindico* is responsible for reviewing and advising the court regarding the debtor's proposed plan, disputed claims, and all other matters relating to creditors' rights.

The court shall also appoint a provisional committee among the three creditors with largest claims as set forth by the debtor. The purpose of this body is to act as information agent and provide advice. The final creditors committee is the overseer required at the stage of performance of the plan approved and in the liquidation in case of bankruptcy.

After commencement of the *concurso* proceeding, the court will prescribe a period during which creditors must file evidence of their claims to the *sindico* for verification. All creditors, including secured creditors, are required by the Bankruptcy Law to have their claims against the debtor verified and accepted by the court. The debtor and any

creditor may challenge the requests filed with the *síndico*. At the end of such verification period, the *síndico* is required to prepare and present a report with its recommendation as to each claim submitted for verification. The court will decide the recognition or dismissal of each credit. The recognition or dismissal of credits may subsequently be challenged before the court by the debtor and the creditors.

The debtor must then present a payment plan covering all the unsecured debts, and at the debtors option may also include privileged debts (the “Plan”). The debtor may also propose to divide the creditors into different categories, based on reasonable grounds of classification.

An “exclusivity period” follows during which the debtor proposes the Plan to its creditors. The exclusivity period is of 90 days, but the court may grant an extension of an additional 30 days based on the number of creditors. In some cases judges have also authorised longer extensions.

During the exclusivity period the debtor should obtain the approval of the same Required Majorities as provided for the APE, with the following clarifications which are specific to the *concurso*: (i) the only creditors who can vote are those whose claims against the debtor are verified and accepted by the court, and (ii) each category of creditors must approve the Plan by the Required Majorities, on the basis of the creditors verified in each category.

Once the Plan has been approved by the Required Majorities, the judge must conduct a substantive review of the terms of the Plan prior to approving it. The judge may, at her discretion, elect not to approve a Plan accepted by the Required Majorities, or on the other hand, approve a Plan that was not accepted by the Required Majorities, upon compliance of certain requirements.

If for any reason the debtor fails to propose a Plan or the proposed Plan is not approved by the Required Majorities, the *special bidding process* explained below begins.

The commencement of a *concurso* among others has the following effects:

(i) the accrual of interest on unsecured claims is suspended; interest on secured debts will continue to accrue, but may only be claimed to the extent of amounts realised from the assets or property subject to such security interests;

(ii) all actions to enforce claims against the debtor which are not secured by a pledge or mortgage are stayed, and the commencement of similar actions against the debtor are prohibited;

(iii) all actions against the debtor are consolidated before the judge presiding over the *concurso*, with limited exceptions; secured creditors can continue enforcement actions, but in event of “need and urgency” the court may suspend such proceedings for a period of not more than 90 days;

(iii) all future obligations of the debtor are accelerated, so that all such obligations are treated as due as of the filing of the petition;

(iv) the existing board and management of the debtor retain authority to operate the debtor's business; transactions outside of the ordinary course of business, including the granting of liens, transactions involving "registrable assets" (such as real estate, automobiles, planes, ships or securities) and similar significant matters, require court approval;

(vi) to approve transactions involving "registrable assets" and similar significant matters, the court will request the opinion of the *síndico* and of the creditors committee before ruling but is authorised to approve such transactions solely in cases of evident need and urgency; and

(v) the management is free to use and allocate any operating income except that no dividends can be distributed; the extent of management's fiduciary duty as to the conservation of the value of the company has not been clearly established, except in the case of fraud.

The *concurso* has certain similarities compared to the APE. Both procedures (i) result in a restructuring plan becoming enforceable against all unsecured creditors upon court approval, (ii) need essentially the same Required Majorities to be approved, and (iii) result in a stay of all claims of unsecured creditors against the debtor as of judicial filing. However, among other differences, (i) the judicial filing of a *concurso* suspends accrual of interest, while the filing of an APE does not, (ii) APE proceedings are faster and cheaper, (iii) in a *concurso* a syndic need to be appointed, creditors need to undergo a verification of credits procedure, and certain acts of the debtor require prior approval of the court, while none of this occurs in an APE, and (iv) the APE produces a less negative impact on the debtor's image.

The *concurso* generally takes between one and two years. Timing will significantly depend on the volume and nature of debt being renegotiated and the size of the debtor. Under recently passed emergency legislation and court rulings, the process has tended to become longer and in some cases may be extended for several years.

Upon failure of agreeing to a Plan during the "exclusivity period", the court will initiate a *special bidding process* (sometimes also referred to as a *cramdown* procedure), which is a process pursuant to which the debtor, the creditors and/or third parties may propose plans for the restructuring of the debts of the company and may acquire the company's stock.

The *special bidding process* is available only if the debtor is a company with equity that may be acquired by the creditors, such as a limited liability corporation (*sociedad anónima*), a *sociedad de responsabilidad limitada* or a *cooperativa*.

Upon failure of obtaining the Required Majorities to approve the Plan of the *concurso*, the court will open a registry during the term of 5 days where any creditor or interested party may register to offer a restructuring plan to the company's creditors, and to purchase the stock of the company. The law does not restrict the shareholders or other persons from registering.

If there are registered persons, the bidding process is initiated. The court will determine the value of the Company's stock based on an appraisal of a valuator appointed by the

court. A 20 day period then commences during which registered persons, including the debtor if the debtor were registered, will present restructuring plans to the creditors and pursue the approval of the same Required Majorities as those required for the *concurso*. The creditors consent is not exclusive, as creditors may consent more than one plan.

The first registered person to file evidence with the court showing that it has obtained the Required Majorities is awarded the right to purchase the company stock and enter into the approved plan it proposes with the creditors.

If the first person to obtain the Required Majorities is the debtor, the proposed plan is approved following the same procedure as in the *concurso*. If the Required Majorities are obtained by another person, the valuation of the stock of the company determined by the judge will be considered. If the stock has negative value, the stock will be transferred to the registered person simultaneously with the court endorsement of the plan. If the stock has positive value, the judge will issue a new valuation taking into consideration the terms of the approved plan. The registered person has then the option to pay the stockholders the stock value determined by the court, or pay a lower value if it obtains the consent of stockholders who own at least 2/3 of the stock of the company.

Once the required majorities are obtained and all requirements are complied with as specified above, the court will endorse the approved agreement. If no person registers within the specified term, or if none of the plans are approved by the Required Majorities, or the court does not endorse the approved plan, the court will declare the bankruptcy of the company.

#### **4.2.3. Bankruptcy**

Under the Bankruptcy Law, the general purpose of a bankruptcy is to identify all the assets and liabilities of the debtor, liquidate the debtor's assets and distribute the proceeds from such liquidation among all creditors in accordance with their verified claims and in the order of preference, and after giving effect to priorities, established by the Bankruptcy Law.

A bankruptcy may be commenced either voluntarily upon the petition of the debtor or involuntarily upon the petition of one or more creditors.

The petitioner must show the company is insolvent or has entered into a “suspension of payments” status. If the petition is made by a creditor, the creditor must submit evidence that the debtor qualifies for bankruptcy proceedings and offer sufficient evidence of his claims and that the debtor has suspended or defaulted compliance of its obligation to the petitioning creditor, or is otherwise unable to comply regularly with its obligations.

In the case of an involuntary bankruptcy, after the petition has been filed with the proper court and all necessary evidence presented, the court will summon the debtor to provide an explanation of the reasons why payment of the obligations in favour of the petitioning creditor have not been paid and to prove that the debtor is solvent. If the debtor does not demonstrate its solvency, the court will declare the debtor to be bankrupt.

In bankruptcy, creditors must request verification of their claims, preferences and priorities in the same manner as specified above for *concurso*, and provide the *síndico* with information as to the total amount, reason and privileges of each claim.

The *síndico* has to file with the court a proposal for the allotment to the creditors of the proceeds obtained from the liquidation of the debtor's assets. The judge will then submit the proposal for the consideration of the creditors. Any creditor may challenge the final report prepared by the *síndico* and the court, in turn, may approve, modify or disallow any portion of the report before discharging the petition. The *síndico* will seek the appointment of a creditors committee to supervise the liquidation of the assets. The creditors with the majority of claims shall elect the committee.

The commencement of a bankruptcy proceeding among others has the following effects:

(i) the accrual of interest on unsecured claims is suspended; interest on secured debts will continue to accrue, but may only be claimed to the extent of amounts realised from the assets or property subject to such security interests;

(ii) all actions to enforce claims against the debtor which are not secured by a pledge or mortgage are suspended, and the commencement of similar actions against the debtor are prohibited;

(iii) all actions against the debtor are consolidated before the judge presiding over the bankruptcy; secured creditors may continue enforcement actions;

(iv) all future obligations of the debtor become accelerated, so that all such obligations are treated as due as of the filing of the petition.

(v) a *síndico* is appointed who succeeds to all managerial power of the debtor; upon a declaration of bankruptcy, actions taken by the bankrupt debtor in respect of property of the estate, as well as payments made or received, are, by operation of law and without judicial declaration, void in respect of creditors; the debtor's former managers are required to deliver custody of the business, including all books, records, real property and equipment, to the *síndico* and are required to provide the judge and *síndico* with all assistance that they may require in order to clarify the state of the debtor's business and to verify the claims against the estate; the *síndico* may apply to the court for authority to continue actively to operate the debtor's business, upon proof that a shutdown will cause irreparable injury to creditors and to the preservation of the bankrupt's net worth.

Please note that some of the effects described above may have occurred prior to bankruptcy as a result of the company having previously filed an APE or a *concurso* before the court.

The process generally takes several years. Timing will significantly depend on the volume and nature of debt being renegotiated and the size of the debtor. Under recently passed emergency legislation and court rulings, the process has tended to become longer.

#### **4.3. Special Insolvency Proceedings**

Companies involved in certain activities, such as banks and insurance companies, must follow special insolvency proceedings in the event of a restructuring or liquidation.

Of the different special insolvency proceedings existing, the proceeding provided under Section 35 Bis of the Financial Institutions Law is worth mentioning. Under this proceeding, the Argentine Central Bank authorises the exclusion and transfer of privileged assets and liabilities to a trust. The credits of depositors and the Argentine Central Bank are included in the list of privileged creditors who have guarantees of the trusts assets. The remaining creditors are required to verify their credits before the bankruptcy court which would liquidate the remaining assets that were not transferred to the trust.

#### **4.5. Voluntary Dissolution and Winding up**

A company may also voluntarily resolve to dissolve and wind up its business. The aim of the winding up process is to liquidate the company's assets, settle its liabilities and distribute any balance to shareholders in proportion to their paid-up capital. During the winding up, the liquidator may only effect liquidation acts and may only involve the corporation in actions which are not evidently foreign to the winding up. The winding-up may be carried out by the management or other appointed liquidators.

## **V - Treatment of Foreign Creditors and International Treaties**

### **5.1. Enforcement of Foreign Judgments**

The Code of Procedure provides that judgements of foreign courts or arbitration awards are enforceable in Argentina pursuant to the terms of the international conventions in force between Argentina and the country in which the judgement was passed. In the absence of a treaty, the judgement is enforceable according to the requirements set forth in Section 517 of the Code of Procedure, as follows:

(i) the judgement must be final in the jurisdiction where rendered, be issued by a competent court in accordance with the Argentine laws regarding conflicts of law and jurisdiction, and have resulted from a personal action or an *in rem* action with respect to personal property which is transferred to Argentine territory during or after the prosecution of the foreign action;

(ii) the defendant against whom enforcement of the judgement is sought must have been personally served with the summons and, in accordance with due process of law, it must have been given the opportunity to defend itself against the foreign action;

(iii) the judgement must be valid in the jurisdiction where rendered and its authenticity must be established in accordance with the requirements of Argentine law;

(iv) the judgement must not violate any principle of public policy of Argentine law; and

(v) the judgement must not be contrary to a prior or simultaneous judgement of an Argentine court.

Once the *Exequatur* is obtained the judgement may be enforced in Argentine courts. Enforcement shall be made according to the same rules established for judgements made by Argentine courts.

## **5.2. Foreign Insolvency Proceedings**

### **5.2.1. Simultaneous proceedings.**

A bankruptcy claim may proceed against the same debtor simultaneously before an Argentine court and a foreign court. In broad terms, the bankruptcy ruling of the court of each jurisdiction will mainly affect the assets located in such jurisdiction.

### **5.2.2 Insolvency proceedings initiated in Argentina.**

Insolvency proceedings initiated in Argentina with respect to a debtor domiciled in Argentina in principle have effects over the assets of the debtor located in Argentina. A bankruptcy decreed by an Argentine court may also serve to declare bankruptcy in a foreign jurisdiction in which the debtor has assets, provided the conditions for declaration of bankruptcy in such jurisdiction are complied with.

### **5.2.3 Insolvency proceedings initiated abroad.**

The declaration of insolvency of a company in a proceeding abroad constitutes grounds for the opening of insolvency proceedings in Argentina (*Concurso* or Bankruptcy), at the request of the debtor or creditor whose claim is to be made effective in Argentina. The Bankruptcy Law provides that, notwithstanding any provision of international treaties, the existence of insolvency proceedings abroad may not be used against creditors whose claims are to be paid in Argentina to contest rights of such creditors over assets existing within Argentine territory nor to declare ineffective any acts which such creditors have entered into with the debtor. If bankruptcy is also declared in Argentina, the creditors involved in the insolvency proceedings initiated abroad may only collect from the balance that remains after the claims made before the Argentine court have been paid. The creditor of a claim payable abroad who has not filed a insolvency claim in the corresponding foreign jurisdiction may file a claim before the Argentine bankruptcy court, provided that such creditor proves that in the country where such claim is payable a creditor's claim payable in Argentina would be given equal treatment regarding filing and collection of a claim in an insolvency proceeding. This is known as the “reciprocity principle.” The holders of claims guaranteed by a security interest are exempted from evidencing reciprocity. After the opening of insolvency proceedings in Argentina, the sums collected abroad in respect of unsecured claims shall be allocated to the dividends payable to unsecured creditors.

## **5.3. Treaties.**

Argentina has entered into numerous treaties with different countries, some of which would apply in the event of an insolvency proceeding. The applicability of a given

treaty will generally depend, among other things, of the domicile of the parties and/or the place of performance of the agreement.

Among other treaties, Argentina became a party in 1988 to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (The New York Convention) and is bound by its provisions, with certain exceptions as described below.

Argentina will apply the convention only to the recognition and enforcement of foreign arbitral awards made in the territory of another contracting state, on the basis of reciprocity. It will also apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

The convention will be interpreted in accordance with the principles and clauses of the Argentine national constitution in force or those resulting from modifications made by virtue of the constitution.