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APE: Argentina's Prepackaged Debt Restructuring System

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This article describes the benefits that the Acuerdo Preventivo Extrajudicial Procedure (APE) provided to facilitate debt restructurings in Argentina after the 2001 crisis.

Background

As of December 2001 Argentina suffered a tremendous financial, political and social crisis. Among other major events, the country declared the default of its sovereign debt, restricted the transfer of funds abroad and withdrawal of deposits from financial entities, and the Argentine Peso, which had been pegged to the U.S. Dollar for more than 10 years, was devalued.

The devaluation was especially prejudicial to those companies that had issued bonds and obtained cross border loans in the international markets, as these debts continued to be owed in their original US dollar or other foreign currency in which they were denominated but could not be paid with the devalued Argentine Peso income of these companies.

Many laws and decrees were passed during the first half of the year 2002 to alleviate the crisis. Among these the Argentine Congress passed an amendment to the Argentine Bankruptcy Law 24,522 (ABL), that among other changes made the “*Acuerdo Preventivo Judicial*” or “*APE*” enforceable against all the unsecured creditors provided certain conditions were met.

Acuerdo Preventivo Extrajudicial

The APE is a procedure by which a debt restructuring agreement that is entered into by a debtor with a certain majority of its unsecured creditors becomes enforceable against all the unsecured creditors, including those that did not consent or voted against it.

The enforceability of the APE against all unsecured creditors is the key feature that makes the APE an extremely useful tool to achieve a successful debt restructuring.

To become enforceable against all unsecured creditors, two basic requirements need to be complied with: (i) the APE debt restructuring agreement must be consented by the majority of creditors provided by the ABL (as described below), and (ii) the court must endorse or validate the agreement (this court ruling is denominated an *homologación*, which basically consists of a judicial confirmation that the ABL legal requirements have been complied with).

Any company can enter into an APE, with a few exceptions related to certain activities that are regulated by special insolvency rules (v.g.: banks and insurance companies).

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Debt Restructuring Implementation

We describe below the typical mechanics for the implementation of a debt restructuring using the APE procedure. These descriptions are based on the analysis of several of the 2001 crisis debt restructuring experiences.

First Stage: Preparation of the Proposal

The debt restructuring procedure is generally commenced by the debtor proposing debt restructuring terms to its unsecured creditors.

The ABL provides freedom of content of the debt restructuring agreement. The debtor company and its unsecured creditors may agree to any or all of the following: amendments, waivers, “haircuts” and/or deferral of principal or interest payments, exchange of notes for new notes and/or equity, new guarantees, payments in cash or in kind, or others.

The creditors may conduct negotiations through a steering committee, although the ABL does not require such a committee to be constituted. Generally the debtor prefers to negotiate the proposal with a steering committee, to ensure a minimum of consents will be obtained. The creditors also prefer to be members of the steering committee, to ensure that the proposal addresses their particular interests. Otherwise an agreement negotiated by other creditors may be “crammed down” on them under the APE procedure.

In the negotiations undertaken during the beginning of 2002 most of the committees of creditors were integrated by the underwriters of the bonds and the banks that had made loans to the debtor. If negotiations were extended over a period of more than six months, these were gradually replaced by “distress” funds. Certain distress funds took aggressive judicial action against the debtors (including filing claims before the Courts of the State of New York). However, in many cases the appearance of the “distress” funds helped unblock negotiations. This was especially so if the distress fund had purchased the debt with considerable discounts, which left them a significant amount of room to come to a profitable agreement with the debtor.

During this period the debtor will generally request a standstill agreement from the creditors. Obtaining this protection is important for the debtor, as the ABL does not provide any standstill protection prior to the APE being filed in Court.

During 2002 and 2003 some debtors conducted a tender offer of notes prior to the implementation of the APE. Under these tender offers, the debtor generally offers to purchase the notes of those holders that tendered their notes at a lower price following an “*inverse dutch auction*” procedure. The tender offer price was generally paid in cash. Given that any outstanding debt held by the debtor or by controlling shareholders of the debtor may not vote to consent and will not be computed when determining the majorities required to approve the APE, the debt which is repurchased is generally cancelled by the debtor.

Second Stage: Consent Period



Once the debtor and the committee of creditors agree on the terms of the debt restructuring agreement, the debtor proceeds to launch the restructuring proposal in order to obtain the consent of a majority of the unsecured creditors.

To obtain court endorsement of the agreement under an APE procedure, the consent of creditors that represent: (i) the absolute majority (more than 50%) of all unsecured creditors, determined on a per capita basis, each individual creditor being computed as “one”, regardless of the amount of their credit, plus (ii) at least two thirds (2/3) of the aggregate principal amount of such unsecured creditors (the “APE Majorities”), is required.

In the 2001 restructurings, the proposals included different restructuring alternatives according to the amount of consents obtained, as follows:

(i) *Direct Exchange*. If the agreement was consented by a significant number of the creditors (v.g. creditors representing 95% or more of the unsecured debt), then the debtor would enter into a direct exchange with the consenting creditors. In this scenario, the benefit of enforcing the restructuring agreement against the “holdouts” was outweighed by the time and cost required for obtaining court approval under an APE procedure, and the debtor would be able to pay the small portion of the debt that was not restructured.

(ii) *APE Procedure*. If the agreement was approved by creditors that represented at least the APE Majorities, but less than the majorities required for a direct exchange, then the debtor proceeded to file the debt restructuring with the Court under the APE procedure in order to make the debt restructuring agreement enforceable against all the unsecured creditors.

(iii) *Failure of the Proposal*. If the APE Majorities were not reached, the debtor had the option to improve the terms of the debt restructuring and launch a new consent period with the aim of obtaining the consent of the required APE Majorities, or file a “*concurso*” if the debtor considers that the APE Majorities will not be reached or is under too much judicial pressure of creditors requesting its bankruptcy.

These majority requirements created various incentives that facilitated the debt restructuring process as follows:

(a) The creditors became less concerned if other creditors would obtain better restructuring terms, and therefore were less reluctant to grant their consent. They reasoned that if the APE Majorities were reached, the APE procedure would be followed and the agreement would become enforceable against all creditors. If on the other hand the APE Majorities were not reached, then the conditions precedent would not be complied with and the agreement they had consented to would not become enforceable (given that the agreement does become binding for the consenting creditor, a properly drafted agreement would include this provision).

(b) If the proposal did not obtain the consent of the APE Majorities, the debtor might be forced to enter into a “*concurso preventivo*” proceeding (similar to US Chapter 11). As the “*concurso*” is more complicated, costly and time consuming than an APE procedure, this creates an incentive for creditors to grant their consent.



(c) The “holdouts” often speculate that they will be paid their credits under the original terms. This is possible only if the debtor obtains a sufficient amount of consents that allow it to enter into a direct exchange (v.g. at least 95%). Therefore the “holdouts” also have the incentive to support the debtor in obtaining the required consents.

Third Stage: Court Filing / Implementation

If majorities for a direct exchange are obtained, the debtor and the creditors proceed to implement the debt restructuring under the terms of the agreement. The debtor would then need to deal with the “holdouts”, but it is not obliged to pay them immediately and could continue negotiating with them under the terms of their outstanding credits.

If the APE Majorities are obtained, the executed debt restructuring agreement is filed with the Court together with a dossier of documentation that mainly refers to the financial situation of the debtor.

The filing of the APE before the relevant court has the effect of staying all actions to enforce unsecured claims against the debtor. However, it does not suspend the accrual of interest on outstanding debt.

The Court will conduct a review of the compliance of the APE Majorities and other formal requirements, and a limited review of the substantive terms of the APE (for example, to determine that basic standards of Argentine law have not been breached, such as compliance of public order regulations, non existence of fraud, etc. or that the proposal does not discriminate creditors on unreasonable grounds).

The Court will subsequently order the publication of notices of the filing of the APE. Non-consenting creditors may subsequently contest the APE on very limited grounds, such as omissions or exaggerations of the assets or liabilities, non compliance of the APE Majorities, or non compliance of the other formal or substantive requirements mentioned in the prior paragraph. Once the oppositions, if any, have been resolved, and the compliance of the APE Majorities and other legal requirements are verified, the court should endorse the APE.

Upon court endorsement, the APE becomes effective against all unsecured creditors, including those that did not consent to the APE.

APE Case Law

Several of the 2001 debt restructurings resulted in proceedings being initiated before several courts. Of these it is worth mentioning the following:

(i) The New York courts ruled in several cases that the debt restructuring agreements approved under an APE proceeding were enforceable in the USA under the terms of Section 304 (currently Chapter 15) of the US Bankruptcy Law (*In re: Telecom, Multicanal, and Cablevisión, among others*); and



(ii) The Argentine Supreme Court recently confirmed the validity of the APE procedure in a case in which its constitutionality was being challenged (*in re: Cablevisión*).