

# Argentina

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Located at the extreme southeast of South America, Argentina is the eighth largest country in the world and the second largest in South America, with a population of approximately 37 million.

Argentina is organised as a federal republic with a democratic political system and 23 provinces. The federal capital is the city of Buenos Aires. The Argentine Constitution provides for 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 legislature, and appoints its own judges to the provincial courts. The judicial system is divided into federal and provincial courts.

Substantive law is passed by the federal Congress and applied throughout the Argentine territory. Procedural law is passed and has effect locally, although the federal Congress formulates national procedural codes (eg, the National Civil and Commercial Procedure Code (the Procedural Code), which applies to proceedings before the national courts of the city of Buenos Aires).

Bankruptcy proceedings are governed by the Bankruptcy Law (24,522).

## **1. The legal framework and the effectiveness of court processes/legal remedies**

### ***1.1 Describe the nature and the effectiveness of the following:***

#### ***(a) Debt recovery remedies where the debtor has no security***

**Precautionary measures:** Under the Procedural Code, any creditor whose claims are due for payment can request the attachment of assets and/or other property owned by the debtor or another precautionary measure (eg, an injunction). Such measures may be requested and ordered *ex parte* (ie, without intervention of the other relevant party).

For the granting of a precautionary measure there must be:

- a *prima facie* claim, including evidence of the creditor's rights and that such rights are being infringed by the debtor;
- a danger in the delay, which could cause the final judgment to lack any practical effect; and
- a sufficient counter-bond to secure the eventual damages caused by the measure (which can be waived by the judge).

**Executory process:** Under the Procedural Code, certain creditors are granted the right to file executory actions against the debtor when their claims are documented in certain instruments (most notably public instruments, private instruments with certified signatures, recognition of indebtedness, promissory notes, cheques and bills of exchange). The main advantage of this proceeding for the creditor is that only a limited number of defences may be raised (eg, lack of competence, lack of standing, payment, defects in title, set-

off or expiry of the statute of limitations), and little evidence need be provided. After considering the complaint, the court either orders or denies the action. Both parties have the right to appeal. After complying with the court order, any party can initiate ordinary proceedings.

**Ordinary proceedings:** Creditors may also file ordinary fact-finding proceedings to collect their claims. Compulsory mediation must take place before filing the claim. Documentary, testimonial and technical evidence may be offered and submitted in connection with the litigation and any defence may be raised. The court will declare whether such evidence is admissible in a preliminary meeting.

**Arbitral proceedings:** Creditors may also collect their claims through arbitration if the relevant agreement includes an arbitration clause or if arbitration is agreed later. Arbitration proceedings tend to be more flexible and quicker than ordinary proceedings. In general, arbitral awards are not subject to appeal and remain confidential. The right to request nullification of the arbitral award cannot be waived by the parties.

**(b) The enforcement of security**

**Mortgages:** A mortgage may be attached to real estate, ships and aircraft. All mortgages must be registered in the relevant registry in order to become public and thus enforceable. Mortgaged property remains in the mortgagor's possession. Mortgages grant the registered mortgagee title to the asset until the secured obligation is extinguished upon payment or performance. Foreclosure is conducted through a special summary proceeding which provides for the sale of the property through a public auction.

**Pledges:** Under 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 cannot obtain direct ownership of the asset. The pledgee has priority over 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. An important characteristic of a commercial pledge is that some creditors are entitled to an out-of-court foreclosure. 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, which allow the pledged asset to remain in the debtor's possession. These 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 all parties upon registration.

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

**Trusts:** Security may also be obtained by means of security assignments and trusts. Trusts may be used to take security over most assets. Goods held in trust form a separate estate from the estates of the trustee and the settlor, and are unaffected by any action brought by creditors of the trustee or the settlor, except in the case of the settlor's fraud. 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 method of sale of the goods held in trust should be provided for under the trust agreement.

**(c) Corporate bankruptcy/liquidation processes**

Bankruptcy or liquidation may be commenced voluntarily upon the petition of the debtor or involuntarily upon the petition of one or more creditors.

Under the liquidation proceeding the debtor's non-exempt property is collected and converted into cash, and the cash is distributed to the various creditors. Creditors must file a proof of claim with the receiver, providing information as to the total amount of, basis for, preferences and priorities of such claim. The receiver is an accountant selected randomly from a pre-existing list.

Creditors can participate in the creditors' committee to oversee the liquidation process. After finalising the conversion of the debtor's estate into cash, the receiver must file a report detailing the acts performed and proposing a distribution plan to creditors which filed a proof of claim with the bankruptcy court (taking into consideration the priorities of such creditors). The debtor and creditors can challenge the receiver's final report before the court.

**(d) Formal corporate rescue processes**

**Bankruptcy pre-emption process:** The bankruptcy pre-emption process is a judicial insolvency proceeding initiated by a debtor to restructure its outstanding debts. It is the Argentine equivalent of the Chapter 11 reorganisation proceedings under the US Bankruptcy Code. Only the debtor can commence such proceedings.

Upon its commencement, the court will appoint a receiver, who is responsible for reviewing and advising the court on the creditors' proof of claims, the debtor's business, the proposed plan and all other matters relating to creditors' rights.

The court will also prescribe a period during which creditors must file proof of claims with the receiver. All creditors, including secured creditors, are required to submit proof of claims and attach evidence documenting the claims. The debtor and any creditor may access the requests filed by creditors with the receiver. The receiver is required to prepare and present to the court a report with recommendations on each claim submitted. The court will then decide whether to recognise or dismiss each claim. This decision confirms the creditors which have the right to vote on the restructuring plan and can be challenged only by an interested party through a separate revision proceeding.

The debtor must then file a restructuring plan. The plan may contain a wide array of proposals (eg, payment, cut-off, grace periods, payment in kind). A plan must be offered to unsecured creditors and labour-related unsecured claims, but the debtor may also choose to propose a plan to priority creditors.

This is followed by an exclusive period during which the debtor proposes the plan to the relevant creditors. The exclusive period lasts for 90 days, but the court may grant an extension of an additional 30 days depending on the number of creditors. In some cases judges have also authorised longer extensions.

For the plan to be approved by the court during the exclusive period, the debtor should obtain approval from the required majorities of unsecured creditors, as follows:

- an absolute majority by creditor, within each category (if any); and
- at least two-thirds of the total principal amount within each category (if any).

Identical majorities are required for creditors with general priority.

Creditors with the right to vote on the unsecured restructuring plan (ie, not including a plan for secured creditors) are:

- unsecured creditors that have been recognised by the competent court; and
- creditors or employees who waive their priority.

Article 45 identifies those creditors whose claims are excluded from the required majority – these are mainly family members, administrators and shareholders of the debtor.

Should a plan for debt with special priority be proposed, all such creditors shall agree to it; if such consent is not obtained, such rejection of the plan does not imply a declaration of the debtor's bankruptcy.

If the requisite majorities are not obtained by the debtor during the exclusive period and the debtor is a business association of the type set forth by Article 48 of the Bankruptcy Law, the court will initiate a special bidding process under which the debtor, its shareholders, its creditors and/or third parties may propose alternative plans for the debtor's debt restructuring. The first party to file evidence with the court showing that it has obtained the required majorities is awarded the right to purchase company stock and enter into the approved alternative plan.

Once the plan has been approved by the requisite majorities, the judge must conduct a substantive review of the terms of the plan before approving it. The judge has the discretion to reject a plan accepted by the required majorities (ie, if the plan is discriminatory, abusive or fraudulent) or, subject to certain requirements, to approve a plan that was not accepted by the required majorities (but accepted by at least 75 per cent of the unsecured capital).

Once approved by the judge, the plan is applicable to non-consenting unsecured creditors and all such claims novate.

**(e) Informal corporate rescue procedures**

**Acuerdo preventivo extrajudicial (APE):** The APE is a corporate rescue process initiated by a debtor to restructure its outstanding debts. It is the Argentine equivalent of the pre-packaged proceedings under the US Bankruptcy Code and consists of an informal negotiation process and, once requisite majorities are met, a court process.

The APE is an out-of-court agreement entered into by the debtor and its significant creditor constituencies, which is subsequently submitted by

the debtor to the appropriate Argentine court for endorsement. If certain requirements are complied with and the APE is endorsed, it becomes binding on all unsecured creditors.

Generally, the debtor commences the APE by proposing a restructuring agreement to its creditors, which must include unsecured debt obligations. If the APE is approved by the requisite majorities, the debtor can file the APE agreement with the court for endorsement. No receiver is appointed. Non-consenting creditors may oppose court endorsement of the plan only on the grounds of omissions or exaggerations of the assets or liabilities, or the absence of the requisite majorities' consent. Upon the resolution of any such opposition, should the requisite majorities be met, the court will endorse the APE after conducting a substantive review of the restructuring agreement.

Timing will depend significantly on the volume and nature of the debt being renegotiated and the debtor's size. If part of the debt is represented by securities that have been publicly offered, note holders' meetings may be called to consent to the APE, which may result in delays.

**Out-of-court agreement without court endorsement:** The debtor can also pursue an out-of-court debt restructuring (eg, an exchange offer of securities or an amendment or waiver of the terms of the debt). The main advantage of this option is its flexibility. The main disadvantages are that:

- the restructuring agreement binds only consenting creditors, aiding those holding out to bring legal actions against the company under the old terms of the debt which were not restructured, including petitioning for the debtor's involuntary bankruptcy; and
- such restructurings may be subject to clawback actions in case of a future bankruptcy or liquidation.

If the restructured debt includes publicly offered securities, the exchange process is governed by the applicable securities laws, including the regulations of the *Comisión Nacional de Valores*, the Buenos Aires Stock Exchange or any other applicable stock exchange on which the securities may be listed.

### **1.2 What are the formal processes to effect a liquidation of the company's assets?**

There is a distinction between:

- voluntary corporate liquidation (dissolution and winding-up); and

- liquidation as a consequence of a declaration of bankruptcy.

#### **(a) Dissolution and winding-up**

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-in capital. During the winding-up, the liquidator may carry out liquidation acts and take actions on behalf of the corporation only if they are within the scope of such liquidation. The winding-up may be carried out by the management or other appointed liquidators.

#### **(b) Liquidation as a consequence of the bankruptcy declaration**

See section 1.1(c).

### **1.3 What is the effect on debt collection and the enforcement of security of:**

#### **(a) An adjudication of corporate bankruptcy/liquidation?**

The commencement of a bankruptcy proceeding:

- requires that both secured and unsecured creditors file a proof of claim with the receiver;
- suspends the accrual of interest on unsecured claims. While interest on secured debts will continue to accrue, it will be paid only to the extent that monies collected from the sale of the assets or property subject to such security interests suffice. The excess capital and interest accrued prior to filing will be treated as unsecured claims;
- implies an automatic stay of all litigation, collection processes, foreclosures, precautionary measures, and any legal action based on any debt or claim that arose before the filing of the bankruptcy petition may not be pursued. Creditors with ordinary and labour-law proceedings initiated before the bankruptcy petition can choose between continuing their proceedings or suspending such actions and filing a proof of claim;
- consolidates all actions against the debtor before the judge presiding over the bankruptcy. Secured creditors have the right to request the realisation of the asset; and
- accelerates all future obligations of the debtor so that such obligations are treated as due upon the filing of the petition.

**(b) The commencement of a formal corporate rescue process?**

The commencement of a formal corporate rescue process has the same effect as the commencement of a bankruptcy proceeding (as explained in section 1.3(a)). Secured creditors that submit a proof of claim can continue enforcement actions, but in case of the asset being required for use in the business, the judge may suspend such proceedings for a period of no longer than 90 days.

**(c) The initiation of an informal corporate rescue process?**

During the out-of-court negotiation and execution of the APE, there is no effect on debt collection or enforcement. In addition, public notice of the existence of an APE endorsement process before the relevant court:

- does not suspend the accrual of interest on outstanding debt; and
- implies an automatic stay of all litigation, collection processes, foreclosures and precautionary measures, and any legal action based on any debt or claim that arose before the filing of the APE petition may not be pursued. Actions related to secured claims can continue.

**1.4 Are insolvency procedures started in another jurisdiction in respect of a corporation incorporated in your jurisdiction recognised? In particular, what would be the impact of US bankruptcy proceedings being commenced?**

The declaration of insolvency of a company in a proceeding abroad constitutes grounds for the commencement of insolvency proceedings in Argentina at the request of the debtor or creditor whose claim is payable 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 the Argentine territory, nor to declare ineffective any acts which such creditors have entered into with the debtor.

If bankruptcy is also declared in Argentina (ie, if two processes are ongoing simultaneously, one in Argentina and the other abroad), the creditors whose claims are paid abroad may be repaid in Argentina only from the balance that remains after the claims payable in Argentina have been fully paid.

Under the reciprocity principle, if no bankruptcy proceedings are initiated abroad the creditor of a claim payable abroad may file a claim before the Argentine bankruptcy courts if it proves that a creditor's claim payable in Argentina would receive equal treatment in the relevant country. The holders of claims guaranteed by a security interest need not show such reciprocity.

Should an unsecured creditor with a claim payable in Argentina receive any payment under a foreign bankruptcy proceeding after commencement of the local bankruptcy, such amount is computed towards its share of the distribution from the local bankruptcy.

**1.5 In what circumstances would the directors or officers of a company in financial difficulties face potential liability for continuing to trade? In practice, are any such provisions actually enforced?**

Argentine law imposes a duty on directors to act loyally to the corporation and its shareholders and to perform their duties with the diligence of "a good businessman". The concept of loyalty includes the obligation to act in defence of the corporation's interests.

Directors may face unlimited personal liability to the corporation, the shareholders and third parties for:

- failure to perform their duties;
- violation of the law or bylaws or regulations; or
- fraud, abuse of power or gross negligence.

Liability of directors to third parties may arise only in the event of fraud, deceit or negligence affecting those parties and will not arise if the only affected parties are the corporation and/or its shareholders.

The plaintiff has the burden of proving that the corporation or the shareholders suffered losses directly attributable to the decision of the board of directors.

In a bankruptcy proceeding, the debtors' representatives and/or managers who have fraudulently caused, facilitated, permitted or aggravated the debtor's financial condition or its insolvency shall compensate for any damages caused.

The exercise of liability actions against limited liability partners, managers, statutory auditors and liquidators shall be referred to the receiver. If any liability lawsuits are already pending, they shall continue to be heard by the bankruptcy court.

## **2. What are the advantages and disadvantages of triggering a formal insolvency or corporate rescue procedure?**

The bankruptcy pre-emption process, the APE and other corporate rescue procedures can be triggered only by the debtor. The first two have the following advantages and disadvantages:

- Both become binding on all unsecured creditors upon court endorsement;
- Both require the same majorities to be approved;
- Public notice of their initiation stays all claims of unsecured creditors against the debtor;
- The judicial filing of a bankruptcy pre-emption process suspends accrual of interest, while the filing of an APE does not; and
- APE proceedings are generally faster and cheaper.

## **3. What are the practical options for out-of-court restructuring?**

The main options for out-of-court restructuring are an APE and an out-of-court agreement without court endorsement (as explained in section 1.1(e)).

## **4. What is the effect on the management of a company of:**

### **4.1 An adjudication of corporate bankruptcy/liquidation?**

The debtor's managers are removed and the receiver assumes duties related to the collection and liquidation of the debtor's estate with the supervision of the court.

### **4.2 The commencement of a formal corporate rescue process?**

Upon the filing of a bankruptcy pre-emption process, the existing board and management of the debtor retain authority to operate the debtor's business in its ordinary course. Certain actions require prior court approval. The receiver scrutinises the debtor's administration.

### **4.3 The initiation of an informal corporate rescue process?**

If there is no agreement with creditors to the contrary, the existing board and management of the debtor retain authority to operate the debtor's

business throughout the process without court intervention.

## **5. Parties in interest/key players**

### **5.1 Who is responsible for the 'case management' control and administration of a corporate bankruptcy/liquidation, a formal rescue and an informal rescue?**

Case management in all formal rescues is carried out by the judge and the receiver. The debtor is also a key player in administering this process and is the sole key player in an informal rescue and the out-of-court part of an APE.

### **5.2 Who is responsible for preparing the restructuring plan in a formal or informal rescue?**

The debtor is responsible for preparing the restructuring plan in a formal or informal rescue. Exceptionally, creditors or third parties can propose an alternative plan (see section 1.1(d)).

### **5.3 Who are the key players? What are their roles and responsibilities?**

In a bankruptcy proceeding, the debtor shall provide the judge and the receiver with the information requested; the receiver shall take possession of the assets, collect credits, initiate actions and assist the judge in understanding the facts and the composition of the estate. The creditors have the right to intervene in the process.

In a bankruptcy pre-emption process, the debtor has a more important role because it maintains administration of the business; in turn, the receiver controls the acts performed by the debtor and the creditors must submit their claims for approval and vote for or against the plan.

In an APE, the debtor performs virtually all acts.

In all three processes the role of the judge is key to the outcome of the proceeding.

## **6. What financial information is available to creditors?**

In order to initiate a bankruptcy pre-emption process, the debtor must provide a substantial amount of information, including:

- detailed information as to the causes of its insolvency;
- the last three balance sheets;
- the status of its assets and liabilities, together

- with the opinion of a qualified accountant;
- a list of all creditors, with one file per creditor containing evidence of the indebtedness or liability; and
- a list of all pecuniary legal actions against the debtor.

Similar information is required to initiate an APE.

There is no true financial information (eg, projections, cash flows) in a bankruptcy pre-emption process, other than the mandatory information to be included in the balance sheet.

In bankruptcy pre-emption and bankruptcy proceedings, the receiver must file a general report to the court which includes:

- an analysis of the reasons for the debtor's financial difficulties;
- an updated description of the assets and liabilities; and
- an opinion as to the classification of creditors in categories.

Recurring financial information and reports must be prepared by the receiver.

## 7. Common questions

### 7.1 Funding and the priority given to new money

**(a) If an insolvent corporation requires urgent working capital funding, what difficulties are likely to be encountered in the provision of such funding?**

Normally lenders are hesitant to lend to an insolvent corporation and if they do they request some sort of security. Should the company be in bankruptcy pre-emption, granting such security requires prior court approval.

**(b) Are lenders providing new money or debtor-in-possession financing given any statutory priority?**

There is no concept of debtor-in-possession financing under Argentine law. Lenders providing additional financing to a debtor in a bankruptcy pre-emption process are not given any statutory priority.

### 7.2 Ranking of creditors

**In what order are creditors paid in a corporate bankruptcy/liquidation?**

The Bankruptcy Law does not contain a principle

equivalent to the US absolute priority rule.

Preferences are governed by a quota system and interpreted restrictively. Therefore, all other claims (with the exception of subordinated claims) shall be considered unsecured and paid *pari passu* among them.

There are many issues surrounding preferences, priorities and allocation of payments:

- Waterfall preferences – these are expenses relating to the conservation, custody, administration and realisation of assets that are the underlying security of a credit, and a proportion of the court expenses related to such assets.
- Secured credits – these are credits secured over specific assets and are collected from the proceeds of the sale of the respective asset. The most frequent credits with special priority are:
  - credits related to the construction or maintenance of assets;
  - certain credits regarding work or labour (eg, over the existing stock, raw material or machinery located in the place where they provide services);
  - some property taxes;
  - mortgages;
  - loans secured by a pledge;
  - liens on machinery; and
  - rights of retention.

Generally, the preference is over only the capital of the credit, with the notable exceptions of certain past interest over labour claims and legal costs, and certain interests over claims secured by a mortgage, pledge or other lien.

- Administrative expenses – these creditors have a right enforceable against the unsecured property based on the performance of certain actions on behalf of or in order to benefit the rest of the creditors after the commencement of bankruptcy proceedings. In general, this category comprises fees of professionals involved in bankruptcy proceeding and the credits of suppliers of goods or services in order to administer, custody or liquidate the estate.
- General priority for labour claims – these are paid after the former two classes and correspond to the excess of the secured labour credit mentioned in the first category over the collection from liquidation of the security. In the event of insufficiency, the concurrence within the class is proportional.
- Other general priority – after the satisfaction of the above classes, 50 per cent of the remaining

monies (if any) is assigned for payment of creditors with general priority. If that 50 per cent is insufficient to satisfy the total amount of credits in this category, such percentage is distributed among the category *pro rata* and the unpaid portion becomes unsecured. The most frequent credits in this class are social security, Medicare and tax claims.

- Unsecured credits – these are all other unsecured creditors.
- Subordinated debts.
- Credits paid abroad (see section 1.4).
- Shareholders or owners – in the case of bankruptcy liquidation, all remaining assets shall be distributed to the debtor or its shareholders (due to corporate liquidation).

### **7.3 Avoidance of antecedent transactions**

**Are there any legal provisions that might operate to invalidate the creation of security, the disposal of an asset or the payment of a creditor by a company in financial difficulties?**

In case of bankruptcy, certain acts performed by the debtor within a ‘suspect period’ are declared non-binding on creditors without the need for express action or petition, or any further procedures. These are:

- gratuitous acts;
- advance payments of debts falling due, according to the relevant evidence of debt, on the date of the bankruptcy or subsequently; and
- the creation of mortgages, pledges or any other preferences, with respect to non-matured obligations which originally lacked such security.

The suspect period commences from the date on which the debtor entered into a suspension of

payments, as determined by the court (up to two years before the bankruptcy declaration in case of a direct bankruptcy).

Other acts prejudicial to creditors’ interests and performed within the suspect period may be declared non-binding on creditors if those transacting with the bankrupt company had knowledge of its insolvency. The affected counterparty has the burden of proving that the act caused no damage to the creditors.

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

### **7.4 ‘Cram-downs’**

**What is the position of both unsecured and secured creditors that vote against, do not agree with or do not consent to either a formal or informal rescue plan?**

Secured creditors are unaffected by any formal or informal rescue proceedings, to the extent that their security suffices. However, endorsement of an APE or approval of a bankruptcy pre-emption process is binding on unsecured creditors, even if they do not consent to it (see sections 1.1(c), (d) and (e) for further detail).

### **7.5 Creditor protection**

**What action can creditors take if they are not satisfied with the conduct of either a formal rescue procedure or a corporate bankruptcy/liquidation?**

Creditors may object to endorsement of the restructuring plan and appeal the decision rejecting the objection. In addition, creditors may file for nullity of the restructuring plan within six months of court approval based on allegations of fraud committed.