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Global Restructuring & Insolvency Guide

Argentina

Overview and Introduction

This Guide analyses the reorganisation and bankruptcy (liquidation) proceedings under *Bankruptcy Law No. 24,522* as amended ("**the BL**"). The BL was enacted on 8 August 1995 and became effective on 11 November 1995. The BL was amended afterwards on several occasions, most recently by *Law No. 26,684* in 2011.

Reorganisation Proceedings

General Considerations Regarding Reorganisation Proceedings

Filing for Reorganisation Proceedings

Under the BL, the prerequisite for filing for reorganisation proceedings ("**reorganisation**") is the status of cessation of payments of debts on a general and regular basis (*estado de cesación de pagos*), whatever the cause or nature of the debt may be.

Reorganisation includes all assets of the insolvent company or natural person and the whole of the debtor's estate, with a few exceptions in connection with debts that are secured by liens.

Corporations must file for reorganisation through their legal representatives. This resolution from the board of directors should be ratified by a shareholders' meeting within 30 days of filing.

The requirements when filing for reorganisation are as follows:

- evidence of registration of the company with the Public Registry of Commerce and filing of its articles of incorporation and by-laws and amendments thereto;
- a comprehensive explanation of the current net worth/equity status of the company, date of suspension of payments and the facts that led to such suspension;
- an updated statement detailing and assessing the assets and liabilities, with a precise indication of their composition, the rules used to ascertain their current valuation, the location, condition and liens on such assets, and other necessary information to enable an accurate assessment. This statement should be annexed to a report made by a certified public accountant;
- a statement indicating the debtor's employees with relevant information for purposes of identifying them, and an accounting certification of any potential debt to social security institutions;
- copies of the debtor's financial statements, including balance sheets and other accounting statements requested by law, corresponding to the last three fiscal years, along with the reports from both the board of directors and the supervisory committee;
- a list of the existing creditors specifying: their domiciles, the value of their claims, their cause, maturity dates, co-debtors, guarantors or third parties liable or responsible, and the priority of the claims. An additional file for each creditor, along with a copy of the documents supporting the claim, and a report from a certified public accountant on the financial statements of the company and its accounting entries, books and documentation, must be annexed to the filing, along with details of all existing judicial or administrative proceedings, indicating the court with jurisdiction

over them. The report from the certified public accountant must expressly indicate whether there are any other labour claims that are unpaid;

- a list of all commercial and corporate books held by the company, which should also be filed with the court; and

- a declaration of the existence of any previous reorganisations.

Based on a preliminary analysis of the documentation filed, the court should decide, within five days of the filing, whether to reject or sustain the petition. The court's resolution sustaining the petition and initiating the reorganisation must set forth the following:

- the date of the hearing to appoint a reorganisation trustee (the *síndico*);

- a deadline for creditors to file their proofs of claim at the trustee's office (see point (b) under "The Reorganisation Plan" below);

- an order to publish legal notices in the corresponding newspapers;

- a deadline for the debtor to file with the court all commercial books of the company;

- an order to register the opening of the proceedings with the corresponding public registry;

- a temporary restraining order against buying, selling or creating encumbrances on the assets of the company;

- an order to pay mailing expenses in regard to the communications to be sent to the creditors reported by the company;

- the dates on which the reorganisation trustee must submit his report on the proofs of claim (see point (c) under "The Reorganisation Plan" below) and a general report describing the company's financial condition (see point (e) under "The Reorganisation Plan" below);

- the appointment of an informative hearing, which shall be notified with special formalities to the debtor's employees; and

- the appointment of a temporary creditors' committee, which shall include one representative of the debtor's employees.

Effects of Filing for Reorganisation

The initiation of the reorganisation proceedings results in the following:

a) the existing management of the company keeps the administration of the company's assets under the supervision of the reorganisation trustee and the temporary creditors' committee. However, the administration is restricted and certain acts are forbidden, i.e.:

   (i) the company may not dispose of its assets for no valuable consideration or through any act affecting or modifying the creditors' condition;

   (ii) previous court authorization is required to perform acts related to assets subject to registration, the sale or lease of the going concern, issuance of bonds or secured negotiable debt, grant of liens, or acts beyond the ordinary course of business.

   The necessary authorization should be requested from the court, which must first discuss the request with the reorganisation trustee and the creditors' committee. All acts performed in violation of the above-mentioned rules have no legal effect against creditors admitted to the reorganisation;

b) if any violation of the above-stated rules occurs, the administration of the company passes, through a court order, to a reorganisation trustee. Nevertheless, in some circumstances the court may instead decide to limit the administration of the company by appointing a co-administrator or a controller, rather than allocating the administration to a reorganisation trustee;

c) the suspension of the accrual of interest on any existing unsecured credit as of the date of the filing;

d) the company may continue performing its obligations under any existing contract in which mutual obligations are still pending (e.g. a license agreement) by securing previous authorization from the court. The counterparty may request the company to fulfil those obligations that were due and outstanding on the date the reorganisation was filed. Should the counterparty not be given notice of the decision to continue with the contract within 30 days of the commencement of the reorganisation, the counterparty is then entitled to terminate the contract;[1]

e) the supply of public utilities to the company may not be suspended after the date of the filing;

f) in principle, all monetary lawsuits existing against the company at the time reorganisation is sought will be suspended and must be forwarded to the court intervening in the reorganisation. However, lawsuits concerned with labour or those of extensive evidence production (*juicios de conocimiento*) may be continued before the courts where they were initially filed, at the creditor's option. If the creditor exercises the option, it will have the right to request admittance of the claim in the reorganisation within six months after the date on which the ruling on the merits becomes final in the litigation. The above obligation to suspend litigation proceedings and remit the litigation to the reorganisation court does not apply to divorce and associated ancillary relief proceedings, actions for expropriation by the government or execution of collaterals;

g) no new lawsuits for collection of debts incurred before the filing for reorganisation may be filed against the company;

h) all preliminary injunctions levied against the debtor may remain in force but that does not affect the status of a claim as secured or unsecured. However, all foreclosures are suspended. No precautionary measures are allowed in lawsuits excluded from the jurisdiction of the reorganisation;

i) in case of evident urgency or need to the company, the court may suspend auctions in mortgage or pledge foreclosure proceedings. This suspension may not exceed 90 days;

j) statutory managers and officers of the company may not travel abroad without previous notice to the court and for no longer than 40 days. Longer periods of travel require special court authorization;

k) the BL had a strong system for labour claims protection, which was furthered with the entry into force of Law No. 26.684, which strengthened such protection in the so-called early payment (*pronto pago*). There are two alternatives. The first is automatic payment, in which the trustee prepares an audit of employee benefits according to the debtor's accounts to be submitted to the court. If certain conditions are met, the judge orders payment of wage claims in the report. The second is employee-driven, in which the request is forwarded to the trustee and the debtor. In both cases, the claims are paid with the available liquid funds of the debtor company and, in their absence, with no less than 3% of gross income.

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[1] Any private agreement executed by the company and third parties in violation of the rules described above at (d), (e), (f), (g) or (h) is null and void.

The Reorganisation Plan

After the filing and the court's ruling initiating the reorganisation, the proceedings continue as follows:

a) the court resolution initiating the reorganisation is published for five consecutive days in the official gazette and in another major newspaper local to the place of business of the company;

b) unsecured creditors must file with the reorganisation trustee a proof of claim supporting the existence and legitimacy of their claims, together with the following:

   (i) a power of attorney, authorizing one or several local attorneys to represent the creditor before the Argentine courts;

   (ii) originals or copies of the invoices and receipts related to the services or products delivered or sold to the company;

   (iii) original documents related to export transactions;

   (iv) original bills of lading (in the case of export operations);

   (v) relevant original letters and correspondence exchanged between the parties or any other documents in connection with the transactions (mortgages, pledges or any other security interests);

   (vi) an affidavit from a foreign attorney stating that the law of the foreign jurisdiction does not discriminate against Argentine creditors whose claims are payable in the foreign country;

   (vii) a legal fee – equal to 10% of the minimum official labour wage which is periodically adjusted – to be paid by each creditor to the reorganisation trustee for costs and expenses. This amount is added to the claim. The amount of this legal fee is at present approximately AR$ 800.

   If a special trustee represents bondholders ("bondholders' trustee"), the BL allows the bondholders' trustee to submit the proof of claim on behalf of its note/bondholders in order to be admitted by the court as a creditor.

   Those creditors that do not file their proofs of claim on time may file a late petition within two years of the date of filing the petition for reorganisation. In such cases, the creditor will most likely be ordered to pay the fees of the reorganisation trustee's attorney, which range from 0.22% to 5.4% of the registered credit (or proved claim), taking into consideration, inter alia: the amount of the claim; the nature and complexity of the claim; and the merits and results of the attorney's performance;

c) once the proofs of claim have been filed, they may be objected to by the company and/or any creditor within 10 days from the deadline to file the proofs of claim;

d) on or before the date fixed by the court in its opening order, the reorganisation trustee should file the report advising the court to accept or reject each of those claims. In order to prepare the report, the reorganisation trustee is authorized to analyse the company's accounting books (and, in certain cases, the creditors' books) and furnish himself with all the elements that he may consider useful to determine the validity of the claims. The trustee may require information from creditors if required;

e) final acceptance of the claims is subject to the court's decision. The creditors or the company may challenge the decision within 20 days from its issuance through a special reconsideration proceeding (the *incidente de revisión*);

f) creditors secured by a lien, pledge or any other security interest must also file a petition for the admission of their claims in the same manner as the unsecured creditors. However, secured creditors may request, at any time, payment of their claims through the sale of collateral. The

court and the reorganisation trustee must examine the document(s) supporting the request and order the sale of the collateral by public auction. The court may request the posting of a security bond. After the public auction sale, creditors are paid principal and accrued interest. Creditors with security interests should seek admission of their claims. Once admitted the secured creditor may continue the process of enforcement of the security. Note that once the claims are admitted in the reorganisation proceedings, they are called *créditos verificados* in Spanish;

g) the reorganisation trustee should also file the general report, which contains:

   (i) an analysis of the causes of the insolvency;

   (ii) details of assets and liabilities, along with an estimation of their value in case of sale;

   (iii) a list of the company's accounting books, with a report on their status;

   (iv) details of the company's registrations with public registries, containing full names and domiciles of the members of the board;

   (v) the date from which payments were no longer honoured (i.e. the date of suspension of payments);

   (vi) a statement as to whether the shareholders have routinely complied with their capital contributions and whether they have incurred in any kind of liability vis-à-vis the company and/or the creditors;

   (vii) a list of acts that should be revoked. Certain acts that occurred two years prior to the filing for reorganisation may have no effect for creditors admitted to the reorganisation;

   (viii) an appraisal of the assets of the company;

   (ix) a determination of whether anti-trust law applies;

h) once the court rules on the admission of the claims, the company should file a proposal to rank the admitted creditors, based upon the value of their claims, the existence of security interests, the nature and cause of the claims, or any other relevant factors. The proposal must set out three categories: unsecured commercial creditors; unsecured labour creditors; and secured creditors;

i) the court then rules on the ranking of the creditors, approving or modifying the proposal filed by the company. The court's decision should also appoint the new members of the temporary creditors' committee, which must include the main creditor within each category;

j) the company has a term during which it manages the presentation of a proposal of payment to its creditors as well as the filing of such proposal with the court. First, the company files a report to the court stating the terms of the proposal to be made to each category of creditors. The payment proposal may differ from one category to another. The report must be submitted to the court within 20 working days before the expiration of the "exclusivity period", i.e. the term determined by the court to allow the company to negotiate the terms of payment with the different categories of creditors. The length of the exclusivity period is set together with the court's decision described in (i) above, and cannot be less than 90 working days or more than 120 working days from the ruling. The company should file the acceptance of the creditors to the reorganisation plan before the expiration of the exclusivity period. Otherwise, the court should declare the company's bankruptcy. The reorganisation plan may consist of a reduction in the amount of the debt, an extension thereof or both combined, as well as the issuance of negotiable debt notes or other similar instruments, or the granting of collateral. The reorganisation plan should also include: an administration regime and restrictions on any disposition of assets, both applicable during the fulfilment period of the reorganisation plan; and the selection of the final creditors' committee, which will control the performance of the reorganisation plan (and which will replace the temporary creditors' committee: see (i) above). A minimum of three members is required, selected from among the major creditors of each

category. The final creditors' committee is fully authorized to advise and report, to request information and documentation of any nature from the company and reorganisation trustee, and to submit petitions to protect the creditors' rights. The final creditors' committee must file with the court a quarterly report of its activities;

k) as noted above, before the end of the exclusivity period, the company should file the written approvals of the unsecured creditors whose claims were admitted by the court to the reorganisation plan. The plan should be approved by the majority of the unsecured creditors (i.e. more than 50% of the unsecured creditors accepted by the court included in each rank), whose claims represent at least two-thirds of the admitted claims corresponding to each category of creditor. Should the company obtain the legal majorities in each rank, the court will declare the existence of a reorganisation plan.

   The bondholders' voting regime under the latest amendment to the BL is as follows:

   (i) the bondholders' trustee or the court calls a bondholders' meeting;

   (ii) the bondholders declare in the bondholders' meeting whether or not they accept the proposed reorganisation plan;

   (iii) the plan is approved if it is accepted by a majority of bondholders voting, which hold a majority of the amount of claims;

   (iv) the BL states that the bondholders' meeting may be avoided if the indenture provides an alternative way of obtaining approvals to the reorganisation plan and the court accepts it;

   (v) in cases in which the bondholders' trustee was admitted as the creditor on behalf of the bondholders, it is allowed to split its vote;

   (vi) in every case, the court may provide measures to ensure that every single creditor participates in the voting and that the voting procedures are being properly implemented;

l) the BL provides that if at the end of the exclusivity period the debtor obtains the required majorities without objections, or where objections are made, they are disregarded by the court, then the court should approve the reorganisation plan. When a proposal does not obtain the required majorities from all classes of creditors, the court may nevertheless approve the proposal if: the proposal is approved by at least one class of unsecured creditors and by the holders of a minimum of three-quarters of the aggregate value of unsecured claims; the court considers that the proposal is fair and that it does not unreasonably discriminate against any dissenting class of creditors; and payments to be made pursuant to the reorganisation plan are not lower than the ones that would have been received by the creditors who rejected the proposal had the debtor been in bankruptcy;

m) in between the court's ruling that declares the existence of the reorganisation plan (see item (k) above) and the court's ruling that approves the reorganisation plan (see item (l) above), any creditor has the right to object to the plan, based on: mistakes in the consideration of the legal majorities; insufficient representation of the creditors; fraudulent increase of the company's liabilities; fraudulent increase or decrease of the company's assets; and failure to comply with formal requirements. If the objections filed by a creditor succeed, the court should immediately dismiss the reorganisation plan and declare bankruptcy;

n) the approved reorganisation plan is mandatory for every unsecured creditor whose claim originated before the filing for reorganisation, whether it has participated in the reorganisation proceedings or not;

o) in all cases, the reorganisation plan approved by the court constitutes the novation of all the obligations with origin or cause prior to the reorganisation proceedings. This novation does not negate the obligations of any guarantors; and

p) if the company does not secure the approval of the legal majorities outlined in item (k) above, the court must declare its bankruptcy unless cramdown proceedings (see below) become applicable.

Conclusion of the Reorganisation

The court should close the reorganisation proceedings once: the reorganisation plan is approved by the court; all measures aimed at the fulfilment of the obligations in the reorganisation plan are taken; the pertinent guarantees are granted; and the general injunction forbidding the disposal of assets that applied during the reorganisation process is reinforced by the court (unless the creditors expressly agree to remove such preliminary injunction). Once the proceedings are closed, the duties of the reorganisation trustee and the duties of any individual appointed by the court to supervise the management of the company end.

Out-of-Court Reorganisation Agreements

The debtor and its creditors may reach agreement and execute an out-of-court agreement (*acuerdo preventivo extrajudicial*) and file it in court to obtain the creditors' approval. This is similar to pre-packaged bankruptcies under the US Bankruptcy Code.

The parties may include in the out-of-court agreement whatever content they consider appropriate to their best interests. The agreement is binding on the parties thereto even if rejected by the court, unless they expressly agreed otherwise.

The out-of-court agreement is to be filed with the competent court along with a set of documents, including an updated statement of assets and liabilities, a list of creditors and the value of their claims, co-debtors, guarantors or third parties liable as regards these claims, a list of pending actions and administrative litigation, the amount of capital represented by the creditors who have signed the agreements, and the percentage this represents with respect to the total registered creditors of the debtor.

To request court approval and make the out-of-court agreement enforceable against all the creditors, the agreement must be executed by a majority of creditors representing two-thirds of the debtor's unsecured debts.

The creditors, whether they fall within the scope of the agreement or not, may object to its approval by the court, but only on account of omissions or artificial increases of the debtor's assets or liabilities, or a failure to secure the majorities required by the BL.

If there are no objections to the out-of-court agreement, or when the objections have been dismissed by the court, and the required formalities are met, the court may approve the out-of-court agreement. Once it has been approved, the out-of-court agreement and the actions taken, or documents executed, in compliance with it may be validly enforced on any unsecured creditor − even a creditor who has not signed the agreement and has not participated in its formulation − and on those secured creditors who were party to the agreement.

Cramdown Proceedings

The BL allows creditors and any other interested parties to propose and obtain acceptance of a buy-out plan if the debtor's payment proposal is short of the required majorities. Therefore, if the debtor is a commercial company, the lack of approval of a reorganisation plan would not be automatically followed by the debtor's bankruptcy. The proceedings set forth by the BL for this optional buy-out plan are governed by the following general terms and conditions:

a) a register of creditors and third parties interested in the acquisition of the company through the purchase of its stock (the "**interested parties**") is opened for five days. If there are interested parties, the court must estimate the market value of the stock of the company based upon an appraisal conducted by an investment bank, a financial entity, or an audit company, or an appraisal carried out by experts appointed by the court at the proposal of the creditors' committee. If no creditor or third party is interested, the debtor is declared bankrupt;

b) the interested parties should negotiate with the creditors and obtain their approval of the plan filed by the interested parties to cancel the debtor's liabilities admitted by the court. The first interested party to secure the required creditors' approval must inform the court and, should the plan be approved by the court, the interested party is entitled to acquire the company's stock at a price to be determined as follows:

(i) when, as a result of the valuation of the company, the court determines the non-existence of a "positive value" of the stock, the interested party is entitled to request the immediate transfer of title to the stock along with the approval of the plan so agreed with the creditors and without any further proceeding, payment or requirement;

(ii) in the event of a "positive" valuation of the stock, its amount should be reduced in the same proportion as the debtor's unsecured liabilities are reduced at their present value as a consequence of the agreement reached with the interested party, at the court's discretion. To establish the present value of the debtor's unsecured liabilities, the court takes into consideration the contractual interest rate upon the claims, the interest rate in force in the Argentine market and the international market, if applicable, and the relative risk position of the debtor company;

(iii) once the value has been judicially ascertained, the interested party may:

- obligate himself to pay the amount due to the partners or shareholders of the company, by depositing 25% of the price as a security, within 10 days following the judicial approval of the reorganisation plan; and transfer of title to the stock will take place immediately thereafter; or

- within the following 20 days, agree on the acquisition of the stock of the company for a value lower than the one determined by the court, by obtaining the consent of the shareholders representing two-thirds of the corporate capital of the company. Once such consents have been obtained, the interested party must serve notice thereof upon the court and pay the resulting balance, according to the formalities and on the dates specified in item (a) above. After complying with these requirements, the interested party acquires title to the stock of the company;

- if none of the interested parties and/or the debtor obtains the required creditors' approvals, then the court will declare bankruptcy.

The BL allows the interested parties to bid for the company while, at the same time, the debtor is given another opportunity to negotiate with its creditors, although with no preference over the interested parties. The company must be appraised at fair market value and by an independent appraiser. In the past, it was appraised at book value. The BL includes other provisions that have made the whole process generally more flexible.

Reorganisation of an Economic Group

Companies that are part of an economic group may file for reorganisation as a group, provided that they have previously proven the existence of said economic group. The filing for reorganisation must include all the companies of the group, without exception. The court may reject the filing when the existence of the economic group is not duly evidenced. Such a decision may be appealed.

Although the rules are generally the same as those applied to a single company's reorganisation, specific rules apply in such cases:

- the court may appoint more than one reorganisation trustee;

- there should be one proceeding for each company;

- the reorganisation trustee should file a general report specifying the general net worth/equity of the economic group;

- the companies of the economic group may file unified proposals of categorization and proposals of payment considering the liabilities of the economic group as a whole;

- the legal majorities to approve such proposals are the same as those described in point (k) under "The Reorganisation Plan" above. However, the proposals will also be considered duly approved if the economic group obtains approvals from more than 75% of the whole amount of claims accepted in all proceedings of the economic group and more than 50% of the amount of claims in each category;

- should the legal majorities not be obtained, the court will declare the bankruptcy of all the companies within the economic group.

Bankruptcy

General

Bankruptcy in basic terms means termination or judicial liquidation of the legal entity. Bankruptcy is only reached through the intervention of the Commercial Court corresponding to the jurisdiction where the company is registered. For bankruptcy declaration purposes, one sole unpaid creditor is sufficient.

The BL does not deprive shareholders of a bankrupt company from ownership of their stock. Shareholders are unrestricted in keeping or selling stock at their discretion. Upon bankruptcy declaration, the legal entity ceases to exist as it did before. The bankrupt entity is thereafter managed by the bankruptcy trustee (*síndico*) under the supervision of the competent court.

In general terms, the basis for becoming bankrupt is that liabilities outnumber assets and that the debtor has a "cessation of payments" status (*estado de cesación de pagos*) (described below). A company that meets these tests may be declared bankrupt under the following circumstances:

- at the debtor's own request for bankruptcy;

- at the request of any creditor upon total or partial default of any liquid and unpaid obligation, or any breach of a reorganisation plan;

- at the request of the creditors' committee upon total or partial default under the reorganisation plan;

- upon declaration of nullity of the reorganisation plan requested by any creditor.

Cessation of payments is not a mere default on payments or breach of a single obligation. It is a general status of a permanent nature that constrains the debtor from fulfilling payments with ordinary resources on a regular basis. The BL provides a more detailed list of cessation of payments indicators, upon which a debtor may be judicially considered insolvent and for purposes of determining the "insolvency date" (a defined term):

- the debtor's acknowledgment that it is unable to honour its debts or a previous reorganisation plan;

- default on payment of debts (within the terms explained above);

- the debtor's managers are missing or hiding and no representative is available;

- the administrative headquarters are shut down;

- the assets are being sold at an outrageously low price, are hidden or are transferred in payment of previous obligations;

- upon judicial reversal of any fraudulent and creditor-impairing activities;

- whenever the debtor is performing any ruinous activities for purposes of obtaining economic resources.

According to section 116 of the BL, the reversal period (*período de sospecha*) starts on the insolvency date and ends on the bankruptcy award date. The reversal period may not go back further than two years from the bankruptcy award date. Sections 118 and 119 provide that certain acts performed during the reversal period may be reversed by the court, such as:

- those activities performed for no consideration;
- payment of debts before they become due;
- securing obligations that were originally unsecured;
- any activities with respect to which the counterparty knew of the company's cessation of payments status at such time and out of which the creditors suffered losses.

Effects

The main effects of bankruptcy are as follows:

- the debtor loses possession of its assets, which must be given to the bankruptcy trustee (some exceptions apply);
- the debtor may not receive payments of any kind;
- the bankruptcy trustee assumes the administration of the debtor company's assets and the complete control of the business. However, the trustee might recommend the court to continue the debtor's business if it would be deemed beneficial for the debtor, or if two-thirds of the debtor's employees so request. The National Government should provide technical guidance to the debtor's employees (if requested), should they continue to run the business with the court's authorization;
- the debtor company's directors are disqualified from performing commercial activities within the territory of the Argentine Republic for one year from the date of suspension of payments.[2] The beginning and ending dates of this one-year period will be determined at the ruling declaring the debtor's bankruptcy. (This restriction may be reduced or removed by the court if the representatives have not committed fraud or any other act in violation of the criminal law);
- the court orders the immediate liquidation and auction of the company's assets;
- the creditors should file a proof of claim for the purpose of being registered with court;
- all pending claims become due as of the bankruptcy award date;
- interest accrual is stopped as of the bankruptcy award date, except for some secured claims;
- the debtor or its directors must request authorization from the court to leave the country until the filing of the general report. Directors who reside outside Argentina are not prohibited from entering the country. The restriction applies only for the purpose of leaving the country;
- any exchange of mails or other communications with the debtor company will be delivered to the trustee;
- where there are reciprocal pending contractual undertakings between the debtor and any third party, the court will determine whether or not the agreement should be terminated;

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2 This is expanded upon below.

- all non-integrated capital contributions from the company's shareholders should be paid in.

Liquidation of the Debtor's Assets

Under the BL, the bankruptcy trustee must carry out the auction of the company's assets within four months from the date of the bankruptcy award. In exceptional cases, the court may authorize an extra 30 days. However, in practice, the liquidation of assets takes much longer, depending on the complexity of each proceeding, the amount involved, and the characteristics and location of the assets.

The debtor company's assets may be auctioned in three different ways:

- auction of the company's complete assets ("bulk transfer") while its business is still ongoing. In this case, the auction mechanism is a public bid or public auction (to be determined by the court) and the base price cannot be less than the valuation suggested by the auctioneer (based on its market price);[3]

- in cases when there is no continuation of the company's business, the assets are auctioned in bulk and may be sold in separate groups if the company is engaged in different activities or based in various locations. The BL does not establish a specific mechanism; therefore the request of base prices is left to the court's discretion;

- auction on an asset-by-asset basis. No base prices are required; however, the court may fix a valuation and set base prices.

In all cases, the debtor's employees could try to organize themselves for purposes of acquiring the debtor's assets.

In any of these cases, the creditors secured with mortgages or pledges will be entitled to collect their claims from the proceeds of the auction of the mortgaged or pledged assets. Any creditor may participate in any of the auction proceedings for the purpose of acquiring the debtor company's assets. If the company is sold while its business is still active, the creditor will be required to post a security bond of 10% of the purchase price offered. In asset-by-asset auctions, no security bond is required.

Distribution of Proceeds

Upon auction of all the debtor company's assets, the bankruptcy trustee must file a report detailing the auction proceeds and a plan for final distribution among the registered creditors, considering the preferences set forth by the BL (see "Legal Preferences" below). The debtor company and/or the creditors may file objections to the report within 10 days of its filing. The final distribution of funds should be approved by the court and the creditors should be paid in accordance with the court's decision.

Legal Preferences

The BL sets the following order of preferences according to which the creditors are to be paid. However, legal preferences may be waived by any creditor in favour of other creditors.

Special Preferences

Creditors accepted by the court with a special preference are entitled to collect their claims from the proceeds obtained in the auction of any asset over which the creditor had a special security, according to the following order of preference:

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[3] The BL establishes that the sale price cannot be less than the total amount of the claims secured with a mortgage or pledge. If the public bid or auction is unsuccessful, a second public bid or auction will be carried out without a base price and the court will decide on how to allocate the proceeds among the creditors.

- creditors for expenses originated in the conservation, administration and liquidation of assets (e.g. legal fees of the trustee and its attorneys; payment of taxes over the company's assets, etc.). The legal preference is set on such assets. The creditor may ask the court to order payment of these expenses at any time from the moment at which the expenses are due;

- creditors who have the right to withhold certain assets of the debtor company (provided that no other creditor had a previous right on such asset);

- creditors for expenses regarding the construction and development of some of the debtor company's assets;

- labour creditors for salaries due from the company to employees for six months, and for severance or labour accidents (this preference only applies on the debtor company's assets located at the site where the employee performed his duties);

- creditors for taxes and contributions on certain assets;

- creditors secured with a mortgage, pledge or guarantee on certain assets, and creditors with bonds secured with special or floating guarantee.

General Preferences

Once all secured creditors with special preference have been paid out, the following creditors are entitled to collect their claims from the proceeds of the debtor company's assets liquidation:

- labour creditors for salaries due from the company to employees for six months, severance and labour accidents, vacations and any other amount due from the company as a result of a labour relationship (this only applies when it was not possible to collect from the proceeds of the liquidation of the debtor company's assets located at the site where the employee performed his activities). Labour creditors for salaries are entitled to collect out of 100% of the proceeds of the liquidation and exclude any other secured creditor with a general preference. The rest of the labour creditors with a general preference (except labour creditors for salaries) are entitled to collect their claims out of 50% of the proceeds remaining once all of the debtor company's assets are liquidated and all creditors with special preference and with a general labour preference have been paid out. Should their claims exceed 50%, the creditors must collect the unpaid portions of their claims on a pro-rata basis with the unsecured creditors;

- social security and unemployment funds entities;

- tax authorities.

Unsecured Creditors

Once all creditors with special preference and with general preference have been paid, those creditors who do not have any preferences are entitled to collect their claims on a *pro-rata* basis.

Legal Fees

The legal fees due to the bankruptcy trustee and the intervening attorneys are fixed at the court's discretion between 4% and 12% of the proceeds obtained from the sale of the company's assets.

Maintaining the Business

The bankruptcy trustee may keep the business going on an exceptional basis when it is believed that the immediate termination could impair the creditors' situation. It is usual in Argentina that the workers obtain court approval to incorporate a workers partnership (*cooperativa de trabajo*) for the purpose of keeping the business as a going concern, thus maintaining their salaries. To keep the business going, the bankruptcy trustee should file a going concern plan, which states:

- the chances of keeping the business as a going concern without assuming new liabilities;
- the advantages of such a plan for the creditors;
- the advantages for third parties;
- the business plan;
- the ongoing commercial agreements that should be maintained;
- a plan for any necessary changes to the company's structure;
- a list of assistants needed for the management of the business; and
- an explanation of how the expenses and debts are to be paid.

There is no obligation upon the debtor company's shareholders to contribute to the expenses of the business plan filed by the bankruptcy trustee. Court approval for such a plan will state the term for such continuation, the assets that are to be allocated for such purposes, the staff to be involved, the commercial agreements to be maintained and the information flow required in the future.

Risks and Implications of Bankruptcy

Bankruptcy Extension

According to section 161 of the BL (as amended), in a bankruptcy scenario, bankruptcy can be extended to:

- any individual or corporation who, pretending to be the debtor company, has performed certain acts in his/its own interest and has disposed of the debtor's assets and rights as if they belonged to him/it, thus committing fraud in detriment of his/its creditors (section 161(1));
- any controlling shareholder of the debtor company, if the controlling shareholder has unduly diverted the debtor company's interests for its own benefit (or for the benefit of the economic conglomerate), and if both of them are under a unified corporate management (section 161(2)); or
- any other individual or corporation whose assets and debts are commingled with those belonging to the debtor company (section 161(3)).

These are discussed further below.

Section 161(1): "Interest Contrary to the Corporate Purpose"

The interest of the person to whom bankruptcy can be extended under section 161(1) could be defined as one contrary to the debtor company's interest, that is to say an "interest that is satisfied out of the debtor's assets".

Consequently, a contrary interest exists not only when there are losses (actual or future) for the debtor, but also when the debtor's profits are lower than reasonably expected and profits are allocated to another entity.

With regard to the existence of fraud in detriment of the debtor company's creditors (as required by section 161(1)), fraud is deemed to exist by virtue of the bankruptcy award.

Section 161(2): "Abuse of Control"

Abuse of control can be invoked if there is enough evidence that the debtor company's controlling shareholders exercise their control over it only to serve their own interest, with a negative effect on the corporate interest of the debtor company. It is worth pointing out that the debtor's interest is different from the interest of the debtor's shareholders, and even more different from the whole economic conglomerate's interest. The debtor company's interest lies in its own corporate purpose.

According to section 172 of the BL, unless one of the circumstances described in section 161 arises (which includes abuse of control), the bankruptcy award of one of the legal entities which is a member of the economic conglomerate will not necessarily be extended to the other members thereof. Another element in section 161(2) describes the abuse of control as "unified corporate management", i.e. the existence of a unique board of directors or the same directors managing both corporations.

Section 161(3): "Commingling of Assets and Liabilities"

The commingling of assets and liabilities exists when it is impossible to differentiate the assets and liabilities of different companies. Some examples of what an Argentine court could take into account to assume the commingling of assets and liabilities are:

- common use (sharing) of revenues not duly recorded in the accounting books;
- joint liabilities without reasonable consideration;
- systematically securing commercial and financial obligations;
- use of a common cash box;
- arbitrary allocation of profits and losses for purposes of balancing income statements or tax accounts;
- granting of mutual loans disregarding repayment ability.

The Bankruptcy Extension Process

Section 164 of the BL provides for specific proceedings for the extension of bankruptcy. These proceedings, called ordinary proceedings (*proceso ordinario*), are long-term, full-knowledge and proof-driven. Ordinary proceedings can be initiated either by the bankruptcy trustee or by any creditor from the date of the bankruptcy award up to six months after the bankruptcy trustee's filing of the general report in court.[4]

The court's decision on bankruptcy extension means the effective adjudication of bankruptcy upon the individual (or corporation) concerned. The bankruptcy extension is effective from the date on which it is pronounced by the court.[5] The entire bankruptcy proceedings (the original bankruptcy proceedings plus other extended bankruptcy proceedings) are presided over by the court with jurisdiction over the bankruptcy proceedings corresponding to the corporation holding the largest assets.[6]

The court's decision on bankruptcy extension includes the following:

- identification of the bankrupt individual or corporation and, in the case of partnerships, that of partners with unlimited liability;
- an order to record the bankruptcy adjudication, and any injunction on assets ordered therein, in the corresponding registries;
- an order to the bankrupt individual or corporation and to any other third party to deliver all the assets belonging to the bankrupt entity to the appointed bankruptcy trustee;
- an order to the bankrupt individual or corporation to submit to the court: information regarding the registration of the entity in Argentina; a precise explanation of the financial condition of the individual or corporation and the exact date of the suspension of payments; a list of assets and

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4 The date on which the bankruptcy trustee should file the general report is set by the court upon the adjudication of bankruptcy.

5 Section 171 of the BL.

6 Section 162 of the BL.

liabilities; a balance sheet, income statement and other accounting documents; a list of all the creditors; and commercial and accounting books;

- a general restriction to make any payments;
- an order to intercept the bankrupt's mail and to deliver it to the appointed bankruptcy trustee;
- a request to the bankrupt individual or corporation and its managers to indicate a domicile within the court's jurisdiction to which any future notices will be served;
- a restriction on the directors traveling abroad. Section 103 of the BL provides that until the filing of the trustee's general report,[7] bankrupt individuals or directors cannot travel abroad without court's authorization. This restricted period may be extended for six months;
- the order to sell the bankrupt's assets and the appointment of a person to be in charge of such tasks;
- appointment of a person in charge of preparing the bankrupt's inventory; and
- setting a court hearing to appoint the bankruptcy trustee.

Foreign Shareholders' Adjudication of Bankruptcy

According to the BL, an Argentine court is entitled to declare bankruptcy on a foreign entity's assets existing within the territory of the Argentine Republic. Moreover, the court is entitled to award the bankruptcy of a foreign entity itself (also having effects on the corporate assets located outside the Argentine Republic). However, such a decision by an Argentine court is open to scrutiny under the corresponding foreign law.

In one particular case, the Supreme Court decided to extend bankruptcy of an Argentine subsidiary to the American and English entities that were members of the same economic conglomerate.[8] Where the debtor company's bankruptcy is extended to a foreign corporation, the foreign corporation is required to notify the court of any assets in Argentina (e.g. its claims against an Argentine debtor) and the court will administer them (through the bankruptcy trustee) at its sole discretion.

Directors' Liability in a Bankruptcy Scenario

Under sections 234 and 235 of the BL, the bankruptcy award leads to the automatic disqualification (*inhabilitación*) of the bankrupt entity, as well as its directors. This disqualification is based on objective (as opposed to subjective − fraudulent or negligent behaviour) parameters, i.e. it is focused on the bankruptcy condition *per se*, regardless of the originating causes thereof. This is an exception to the legal regime of director liability set forth in Argentine corporations law.

The discharge (discontinuance of the disqualification) of the disqualified party is ordered within a period of one year unless there is a criminal action filed against the director, in which case the disqualification period is extended until the termination of the criminal action.

At the time of the bankruptcy award, the situation of the following two groups must be established:

- those persons who are members of the board of directors at that time;
- those persons who are no longer members of the board of directors at that time.

In the first case, the disqualification of the directors is effective from the date of the bankruptcy award. For directors who have held office since the cessation of payments (the insolvency date: see above),

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7 Depending on the complexity of the case, the trustee's general report is usually filed between 10 and 12 months after the date of the bankruptcy award.

8 Supreme Court, "*Cía. Swift de La Plata S.A. Frigorífica s/ convocatoria de acreedores*", 4 September 1973 and 21 September 1976.

but on the date of the bankruptcy award are no longer directors, the one-year term of disqualification becomes effective from the insolvency date.[9]

A disqualified director may not engage in commerce, either on his own account or through third parties. He may not be a manager, administrator, statutory auditor or founder of companies, associations, mutual companies and foundations. He may not hold an interest in companies, nor discharge duties as attorney-in-fact.

Directors must appear before the judge whenever they are summoned to provide explanations about the financial condition of the debtor company. They are under the obligation to furnish the court with any information that may be requested. If a director fails to appear, the judge may seek the aid of public force to have directors appear in court.

As mentioned above, directors must request an authorization to leave Argentina's national territory from the judge having jurisdiction over the bankruptcy proceedings. Such authorization is granted upon reviewing each particular case unless their attendance is essential to clarify the financial condition of the debtor company. After the submission of the general report by the bankruptcy trustee (normally not less than 10 months to one year after the bankruptcy award date), directors must only apply for an express permission if they were to leave the territory for a period of more than 40 calendar days.

The judge may decide to extend such term for a further maximum six-month period by issuing a relevant judgment. In this event, the judge shall provide detailed support for such decision.

In cases when the bankrupt entity has no assets, the commercial judge remands the case to a criminal court for further investigation.

Third Parties' Liability in a Bankruptcy Scenario

Liability for damages to the bankruptcy estate due to the activity of third parties (directors, managers, attorneys-in-fact, etc.) is set forth in section 173 of the BL. This provision expressly provides that the reproachable behaviour must have caused, facilitated, allowed or aggravated the bankrupt debtor's financial condition or its insolvency.

Furthermore, the criterion to adjudicate liability is exclusively limited to the "wilful intent" existing at the time the third party facilitated, permitted or impaired the financial condition of the debtor or its insolvency. Arguably, it refers to any tortious act performed in a knowing manner and with an intent to inflict damages on a third party, or on the rights of a third party.

As provided by section 174 of the BL, this liability also applies to such acts that may have been carried out up to one year before the insolvency date, and must be declared and determined in proceedings instituted by the bankruptcy trustee. This action becomes statute-barred after two years from the date of the bankruptcy award and the prior approval of the absolute majority of the unsecured claims which have been acknowledged and declared admissible.

Under section 175 of the BL, the bankruptcy trustee can sue the shareholders of the bankrupt company if they have caused or contributed to the insolvency of the company. This is not applicable if, in its relationship with the bankrupt entity, the shareholder exercised its legal rights as a third party in arm's-length conditions.

This action under section 175 is similar to the action for bankruptcy extension, although there are greater consequences in the case of bankruptcy extension.

Bankruptcy Conclusion

There are three different ways to close bankruptcy proceedings:

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[9] The commencement date of the insolvency must be reported by the bankruptcy trustee in the general report and the interested parties (the directors, etc.) may file objections thereto within a 30-day term. At that stage, they may offer submissions of the relevant evidence, which may be allowed by the court, should it be deemed necessary.

- agreement of 100% of creditors (the *avenimiento*);
- total payment of claims; or
- termination of the bankruptcy procedure either through final distribution of proceeds or a total absence of assets to be liquidated. In the latter, the BL presumes the existence of fraud and the commercial judge will request the intervention of a criminal court.

Argentina

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