Six Key Considerations for Argentine Creditors

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In the wake of Argentina's debt default in 2001 and ensuing banking crisis, the country's insolvency laws underwent several important reforms in the early 2000s and again in 2011. Until then, Argentina's Bankruptcy and Liquidation Law No. 24,552 (*Ley de Concursos y Quiebras*, "LCQ") focused on in-court reorganization and liquidation proceedings, which called into question the Argentine judicial system's ability to effectively and expediently handle bankruptcy proceedings at a time of macroeconomic and political crisis. In response to these shortcomings, and encouraged by the International Monetary Fund and international creditors, in 2002 Argentina amended the LCQ, most notably by amending a previously underutilized part of the LCQ that provided for an out-of-court reorganization proceeding called an *acuerdo preventivo extrajudicial* or "APE".[1]

Following the enactment of the 2002 amendment, a handful of Argentine companies that had obtained significant financing in the international loan and capital markets successfully restructured their debt pursuant to the revamped APE proceedings (and a number of others have used the threat of an APE or an in-court *concurso preventivo* proceeding to successfully consummate an out-of-court restructuring). Today, as Argentine debtors once again encounter challenging macroeconomic conditions, including a significant devaluation of the Argentine peso and high borrowing rates, the LCQ no doubt will once again become a useful tool to deploy and will define the parameters of in-court arrangements intended to address illiquidity and/or insolvency issues.

This article sets forth a brief overview of Argentina's LCQ, followed by a discussion of the various aspects of Argentine insolvency law that creditors and distressed Argentine debtors alike should consider in anticipation of a potential restructuring or liquidation proceeding.

Argentina's Bankruptcy and Liquidation Law

Today, Argentina's insolvency regime is made up of three alternative proceedings: (i) the in-court *concurso preventivo*, (ii) the APE and (iii) liquidation (*quiebra*).

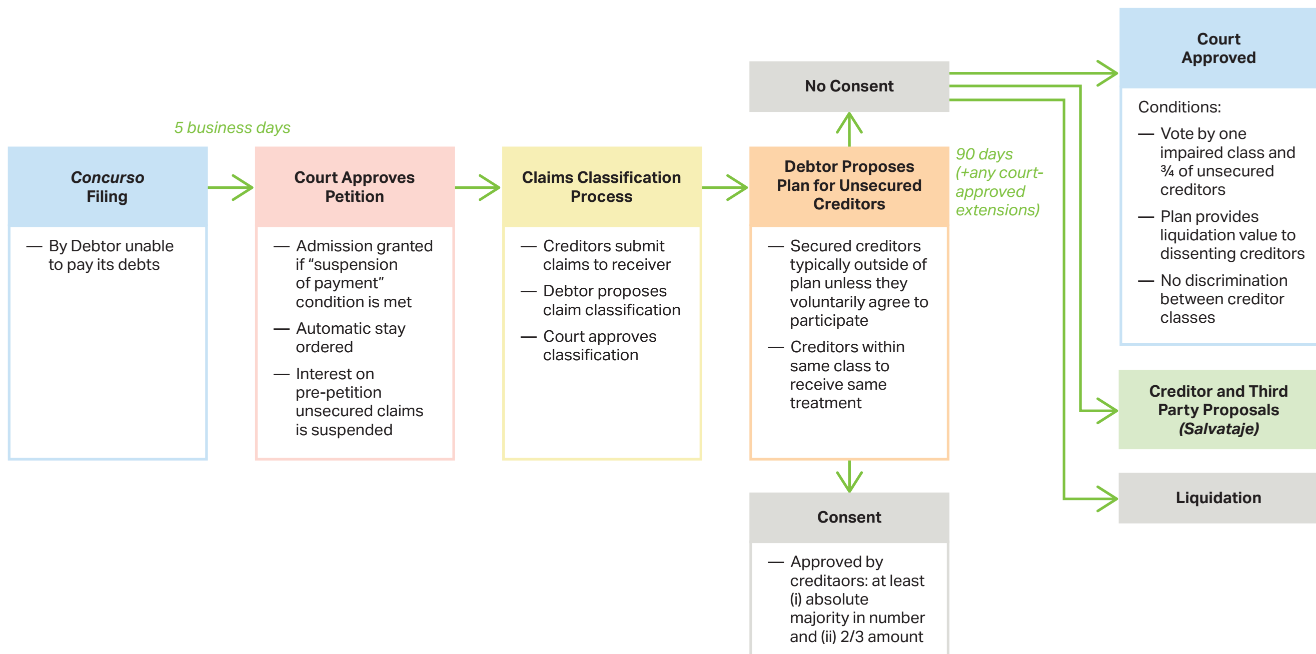
Concurso Preventivo

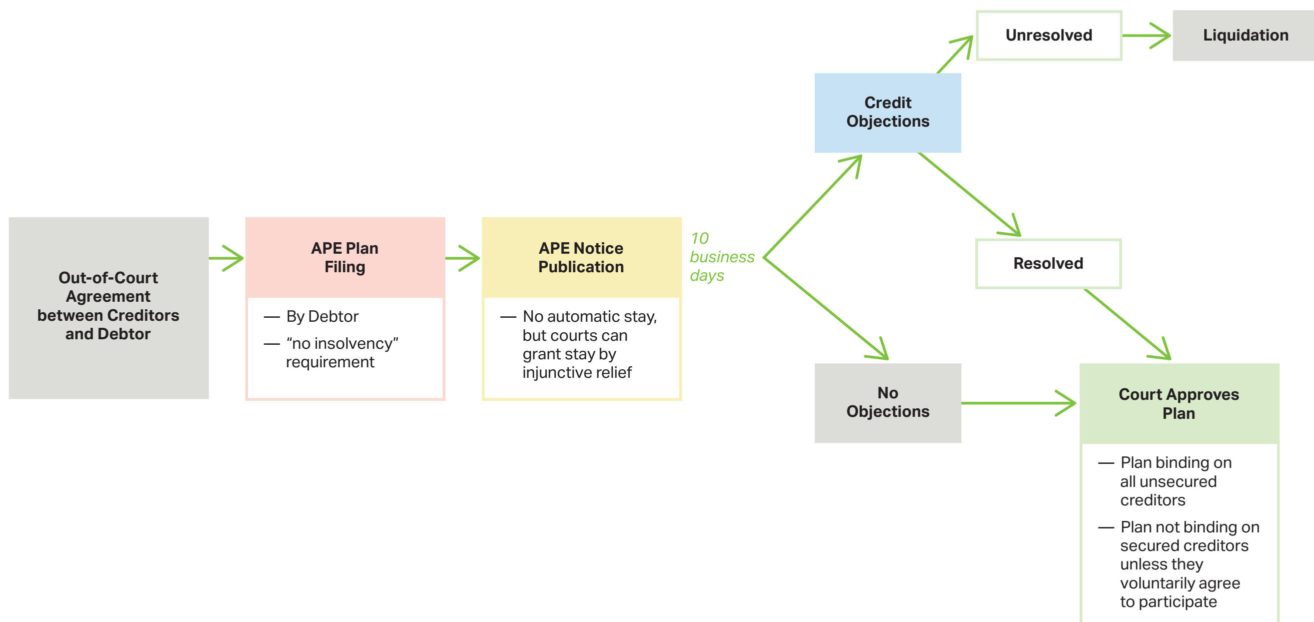
The in-court *concurso preventivo* is loosely akin to a Chapter 11 proceeding in the United States. A *concurso* proceeding may only be initiated by a debtor that is in a state of "suspension of payment" (*estado de cesación de pagos*) or unable to pay its debts as they come due. Once the debtor has filed for *concurso* and demonstrated to the court that it is in "suspension of payment," the court grants judgment commencing the proceedings. Creditors have fifteen to twenty business days following the debtor's publication of notice to submit their claims to a court-appointed receiver. Upon the court's approval of the register of claims, the debtor may elect to submit its own proposed classification of creditors to the court. Pursuant to the LCQ, such debtor's classification must contain, at a minimum, three classes of claims comprised of secured, unsecured and labor claims (to the extent they exist). All subordinated creditors must be classified together. Beyond these requirements, however, a debtor may propose such other classifications based on the reasonable characteristics of its creditors as it deems appropriate.

The debtor benefits from a ninety-business day exclusivity period, beginning on the date on which the court approves the debtor's proposed creditor classification, to submit a plan for its unsecured creditors and obtain the consent of the required majority of unsecured creditors.[2] The ninety-business day period may be extended by a maximum of thirty business days at the court's sole discretion. Although the debtor's plan may offer different terms to each creditor class, creditors *within* the same class must receive the same treatment. To be approved, at least a required majority of creditors must consent to the plan within the exclusivity period. Votes by controlling shareholders are excluded, and only creditors whose claims have been admitted by the court will be able to vote. Once approved by the court, the plan becomes effective and is binding upon all non-consenting creditors. In the event, however, that a debtor fails to consummate a *concurso* proceeding, the debtor or any creditor to whom a debt is due may then initiate *quiebra* proceedings.

As discussed below, secured creditors remain outside the plan unless they voluntarily agree to participate. However, if the court determines that the value of a secured creditor's collateral is less than the value of its claim, the creditor's claim with respect to the shortfall may be treated by the court as unsecured. Therefore, a *concurso* plan may be binding on the unsecured portion of a secured creditor's claim.

***Concurso* Process**



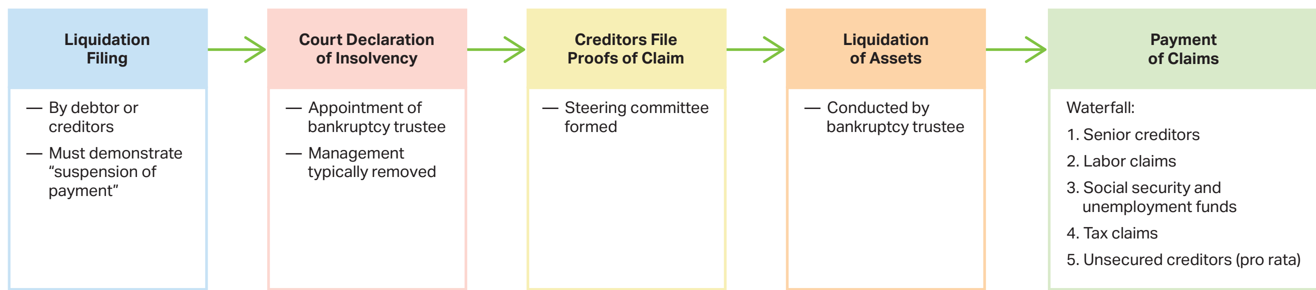


During the pendency of the *concurso*, the debtor's management remains in place and the debtor continues to manage its assets subject to supervision by the court-appointed receiver. Certain material transactions and other actions falling outside the scope of the ordinary course of business, however, are either prohibited or require judicial authorization. Prohibited acts include transfers for no consideration or measures affecting the status of pre-petition creditors. The debtor is also subject to supervision by a creditor's committee, which is formed by the court. The creditor's committee originally consists of the debtor's three largest unsecured creditors and an employee representative. The committee's composition, however, is updated based on the debtor's classification of its creditors to include a representative from each class of creditors.

Acuerdo Preventivo Extrajudicial

The APE is an out-of-court voluntary proceeding, somewhat similar to a pre-packaged Chapter 11 filing in the United States. In an APE, the debtor negotiates with and procures the consent from the required majority of its creditors (which, as in the case of a *concurso* proceeding, requires creditors representing at least a majority in number and two-thirds in outstanding amount of the unsecured class) before formally initiating proceedings by filing the APE plan with the court for judicial approval. Commencement of APE proceedings can only be initiated by the debtor and typically requires approval from its board of directors. Unlike in a *concurso*, debtors are not required to establish or declare themselves insolvent to file an APE, which often helps reduce the extent of disruption to the debtor's operations; nevertheless, APE proceedings, like other pre-packaged insolvency proceedings, constitute an event of default under customary bankruptcy event of default triggers in the debtor's debt instruments.[3]

A notice of the APE proceeding is published once the debtor has filed the restructuring plan with the court. Creditors have ten business days following the publication of the notice to file any objections to the APE, which are limited to objections on the basis that (i) the required majority of creditors has not agreed to the APE, (ii) the disclosure materials filed in connection with the APE are inaccurate, (iii) the substantive terms of the APE are fraudulent, contravene public order or unreasonably discriminate against certain creditors or (iv) the debtor has not complied with certain formal requirements in connection with the filing. The LCQ does not provide clear guidance as to what constitutes "unreasonable discrimination" against creditors; however, Argentine courts have found, for example, that APEs that propose to convert foreign-denominated contracts into peso-denominated obligations, where most of the debtor's indebtedness was denominated in Argentine pesos, constitutes unreasonable discrimination against creditors. If no creditor objects within the ten-business day period, the LCQ provides for the court's approval of the APE without conducting substantive review.



Courts, however, have interpreted the LCQ to provide that, even if no creditor objections are lodged, judges have the power to reject an APE if it does not meet certain basic fairness standards. Upon the court's approval, the APE becomes binding on all *unsecured* creditors, including non-consenting unsecured creditors. Like a *concurso* plan, the APE is not binding on secured creditors (other than with respect to the unsecured portion of their claim) unless they expressly agree to its terms.

Quiebra

A *quiebra* or liquidation most closely resembles a Chapter 7 liquidation bankruptcy proceeding in the United States. Unlike the in-court and APE proceedings described above, which can only be initiated by the debtor, a *quiebra* may be initiated by either a debtor found to be in "suspension of payments" or by any of its creditors to whom a debt is due.[4] In the case of secured creditors, creditors may initiate a *quiebra* when the value of its security is insufficient to cover its claim. Any creditor initiating a *quiebra* proceeding must also evidence to the court that the debtor qualifies as being in "suspension of payments." Often, a *quiebra* results from a debtor's failure to successfully consummate a *concurso* proceeding or to restructure through an out-of-court agreement. Debtors may also file for *quiebra* where a debt is made up primarily of secured debt held by a large number of creditors, or where its business is no longer viable.

Unlike in a *concurso*, management is removed upon the court's declaration of insolvency and a bankruptcy trustee is appointed by the court. Following the trustee's appointment, all secured and unsecured creditors must file proof of claims with the trustee (subject to certain exceptions, such as labor obligations) and, with limited exceptions, the debtor may no longer dispose of or manage its assets. A steering committee, formed by the bankruptcy trustee and comprised by the various creditors, is tasked with performing certain management functions during the liquidation proceeding. Although courts have required debtors in *quiebra* to continue their operations in certain cases—e.g., where deemed necessary to protect the creditors' interests or in the case of public utilities—the primary purpose of the *quiebra* is to liquidate the debtor's assets.

Under the LCQ, the bankruptcy trustee must carry out auction proceedings within four months following the court's determination of bankruptcy. In certain cases, courts may extend this period of time by an additional 30 days; in practice, however, the entirety of the auction process typically takes significantly more time. Factors such as the number of creditors, the complexity of the proceedings, challenges raised by the debtor, participation by the Public Ministry, amounts involved and the location and characteristics of assets may affect the amount of time it takes to liquidate a debtor's assets. Participation by employees may also cause significant delays in *quiebra* proceedings, as reforms to the LCQ in 2011 provided employees greater say over the liquidation process, including the ability of employees to vote in favor of the continuation of the debtor's business. Auction proceedings may take three forms under the LCQ; in all cases, however, the final distribution of proceeds among creditors whose proof of claim has been sanctioned by the court is made in accordance with the following order of preference: first, to creditors deemed by the court to have statutory seniority over a liquidated asset, which includes secured creditors; second, to certain labor creditors; third, to social security and unemployment fund entities; fourth, to tax authorities; and fifth, to unsecured creditors on a pro rata basis.[5]

Six Key Takeaways and Considerations

1. Are creditor enforcement actions stayed during insolvency proceedings?

Once a bankruptcy case is commenced in the United States, an automatic stay under the bankruptcy code stops all foreclosure actions and lawsuits upon the filing of a Chapter 11 petition. Under the LCQ, debtors benefit from a similar stay as to lawsuits and foreclosure actions. In *concurso* proceedings, the court has five business days following the filing to approve the debtor's eligibility as insolvent under the LCQ. Once approved, the court initiates the proceeding by ordering a stay of all pre-petition monetary unsecured claims and a suspension of the accrual of interest on pre-petition unsecured claims.[6] In an APE, debtors do not benefit under the LCQ from a stay on claims similar to that in the *concurso* once the court admits the APE filing and publishes the notice of the proceedings; however, it is not uncommon for courts to grant a stay on claims by way of injunctive relief in anticipation of the formal filing of an APE. In the recent restructuring of Industrias Metalurgicas Pescarmona S.A. ("IMPSA"), for example, various bankruptcy requests and executory lawsuits filed against IMPSA in a Buenos Aires commercial court were stayed upon the court's approval of the APE, which was filed in a Mendoza court and publicly announced on August 17, 2017.

Unlike in Chapter 11 proceedings, however, stays in *concurso* and APE proceedings do not extend to secured creditors, who are able to continue to exercise their rights and remedies. Once the *concurso* or an APE is filed, secured creditors seeking to initiate or continue foreclosure proceedings related to their secured claims, such as mortgages and pledges, must file a *pedido* (petition) notifying the court of the relevant proceeding.[7] Moreover, the LCQ does not distinguish between "essential" and "non-essential" assets. Secured creditors are generally able to foreclose on their validly perfected collateral even when the collateral consists of assets that are deemed "essential" to the debtor's business. The court in a *concurso* may, however, suspend or otherwise enjoin foreclosure of assets subject to a pledge or mortgage by up to 90 days, to protect creditor interests or on grounds of need and urgency for the continuation of the operation of the estate. Courts have extended the suspension beyond the statutory 90-day period where the assets are considered necessary for the continuity of the operation of the debtor (i.e., where it is the company's single most important asset such that viability of the *concurso* proceeding would be impaired without it). Nonetheless, debtors whose key assets are pledged face a significant risk that their assets could be whittled away during the pendency of their restructuring. Secured creditors, in turn, often hold significant leverage when negotiating with a debtor in those proceedings.

2. Does Argentine insolvency law in an APE impose any limitations on the classification of creditors and content of the APE?

Unlike the *concurso*, which, as discussed above, sets forth minimum classification requirements for creditors, the LCQ affords debtors and creditors wide discretion over the terms of the APE. For example, the debtor is generally free to propose an APE whereby unsecured creditors are classified differently and receive differential treatment, subject only to the judicial doctrine that the classification be reasonable and non-discriminatory. Moreover, the LCQ provides debtors with significant discretion over the content of the APE. Such discretion provides debtors with the flexibility to structure the terms of the APE to reflect, for example, amendments, waivers, deferrals of principal or interest payment, exchanges of instruments, new guarantees and payments in cash or in kind. In addition, APEs may contemplate changes to a debtor's capital structure and composition of the board of directors.

3. What is the consent threshold and how is it satisfied for debt securities?

Subject to the procedures described in the following section, in order for a restructuring plan in a *concurso* or an APE to be approved by the court, it must be approved by creditors representing at least the absolute majority of all unsecured creditors, determined on a per capita basis, and at least two-thirds of the aggregate outstanding principal amount of unsecured debt. In the event there are multiple classes of creditors, the two-thirds requirement applies with respect to each class. The meaning of the headcount requirement has spurred significant litigation (and delays) as to the procedure for counting the number of creditors where the unsecured bonds at issue are held of record by one holder (e.g., a depositary or custodian) but is in turn indirectly or directly beneficially held by multiple participants.

Courts have interpreted the law to require a meeting of the bondholders whereby, unless unanimity is reached among the bondholders, the indenture trustee for such bondholders is deemed to have cast one vote in favor of approving the plan and one vote against the plan. For practical purposes, this means that, unlike in a Chapter 11 proceeding, individual holders of such securities are not counted as separate creditors for voting purposes. Therefore, even if, for example, holders representing 90% of the principal amount of a security held of record by a common depositary voted in favor of a plan and only 10% of holders voted against it, the trustee would be deemed to have cast two votes, one in favor and one against the plan. This method of calculation provides non-consenting bondholders with significant leverage in the restructuring process, as a single vote against an APE in a bondholders' meeting could in theory have the effect of preventing the APE from being approved altogether.

4. Can a restructuring plan be crammed down on dissenting classes?

Unlike in a Chapter 11 proceeding in the United States, debtors in a *concurso* proceeding do not have the ability to cram down a plan against dissenting creditors where the requisite consents are not obtained by the end of the exclusivity period. However, in certain cases, the court may still approve the plan if: (i) the plan was approved by both (a) at least one of the impaired classes of unsecured creditors and (b) unsecured creditors representing at least three-fourths of the aggregate outstanding unsecured claims that voted to confirm the plan, (ii) the plan provides at least liquidation value to dissenting creditors and (iii) the plan does not provide for discriminatory treatment among classes.

In addition, where the debtor is a corporation, limited liability company or cooperative, or is otherwise owned (in part or in whole) by the federal, provincial or municipal government, a debtor's failure to obtain the required majority consent and a court's recalcitrance to approve a plan notwithstanding will not automatically result in a *quiebra*. Instead, pursuant to *salvataje* procedures under the LCQ, creditors and other third parties are permitted, within a very narrow window, to propose a plan, subject to the same consent requirement.[8] While the creditor or third-party plan does not require debtor consent, debtors maintain the right to propose modifications or alternative plans. Failure to successfully consummate any such creditor or third-party plan results in a *quiebra*. Although this recourse is available only to the above-mentioned entities and is seldom used, this tool is particularly relevant in the case of an ad hoc group of holders that wishes to put forth its own restructuring plan. By the same token, however, given that there are also no limits on the persons or legal entities that may propose a plan as a third party, creditors should also weigh the risks and benefits associated with a proposal from an unfamiliar third-party constituency.

Salvataje procedures also do not apply to secured creditors. Rather, the LCQ requires that debtors pay secured creditors the full value of their security unless they voluntarily agree otherwise. From a practical perspective, this means that any restructuring plan or APE that purports to touch secured creditors' claims must be approved by unanimous consent of all creditors within the class and/or subcategory of secured creditors, unless a secured creditor opts to renounce 30% or more of their security interest and be treated (with respect to that portion of their claim) as an unsecured creditor. The LCQ defines claims as the principal and interest accrued as of the date the debtor submits its pre-agreed restructuring agreement to the court for judicial approval. It is possible, however, for an unsecured creditor to share a new security interest with an existing security under the proposed restructuring plan or APE; however, in the case of assets, such new security must be permissible under the existing security documents and shall enjoy second priority unless the holders of the existing security provide their consent. The LCQ is silent as to whether unsecured creditors may become secured by obtaining a security on unencumbered assets. Secured creditors, therefore, ordinarily do not participate in *concurso* or APE proceedings, and often have significant leverage over the debtor vis-a-vis unsecured creditors, who are both subject to the stay and *salvataje* procedures.

5. How long do *concurso* and APE proceedings generally take?

In comparison to Argentina's old insolvency regime, the LCQ establishes certain strict deadlines for various phases in the proceedings. For example, once a court issues a judgment initiating *concurso* proceedings, creditors have only fifteen to twenty days (as ordered by the court) to submit their claims. Moreover, in the context of the APE,

the role of courts is limited to ensuring that (i) the debtor discloses certain baseline financial information regarding the extent of the debtor's assets and liabilities, (ii) the required majorities have agreed to the APE, (iii) that certain procedural matters have been complied with and (iv) that objections to an APE are adjudicated.

Notwithstanding the creation of deadlines and limitations on the court's role, in practice, restructuring proceedings in Argentina typically tend to take, on average, two to three years in the case of a *concurso* and one to two years in the case of an APE, namely due to judicial extensions and appeals. For example, although creditors in an APE only have ten days following filing to raise objections and file the requisite evidence, and the debtor has the following ten days to resolve the objection, in practice, it often takes months to resolve objections as courts extend these ten-day periods. In the APEs filed by Multicanal and Sideco Americana, for example, objections filed by third parties, who were ultimately found to lack standing, resulted in significant delays. Court approval for the APE filed by Transportadora del Gas del Norte ("TGN") was similarly delayed on account of objections and ensuing litigation. Faced with changing economic circumstances, TGN withdrew its APE and attempted to file for *concurso*. The court, however, ultimately rejected TGN's request for bankruptcy protection immediately following the company's withdrawal of the APE previously initiated as the LCQ prohibits such filing within a year of the withdrawal if liquidation petitions (stayed in the context of the APE proceeding) remain pending. Even in the case of IMPSA, whose APE was ultimately successfully approved by the court, it took the company approximately 3-5 years to negotiate with its creditors and eventually obtain court approval.

6. Are there additional stakeholders that could have a significant impact on the outcome of a restructuring?

Creditors should be mindful of the fact that labor claims enjoy beneficial treatment in insolvency proceedings, and receive separate treatment from secured and unsecured creditors under the LCQ. Once a debtor files for insolvency, the court may direct debtors to immediately pay labor claims based on indemnifications, penalties or severance payments, without requiring claimants to file proof of their respective claims. The LCQ also grants employees the right to participate in *concurso* proceedings as members of the creditors' committee.

Under the LCQ, public fees and federal, state and municipal taxes also enjoy special priority. Restructuring plans and APEs, therefore, must exclude the total amount of fees and taxes from the total amount of debt to be restructured as such debt cannot be crammed down on governmental entities. In addition, debtors cannot submit restructuring proposals to the Argentine Tax Authority ("AFIP") or state

and municipal tax authorities, and instead may only choose among government-sponsored "payment plans." Such plans cannot be modified or challenged. AFIP also participates in restructuring proceedings as a creditor with a priority claim related to the debtor's mandatory pension payments.

Other than the above-mentioned taxes entities, the LCQ does not explicitly provide for the participation of public entities. However, governmental entities oftentimes play a role in *concurso* or APE proceedings. One such governmental entity is the Argentine social security agency ("ANSES"), which typically only participates in *concurso* or other insolvency proceedings as a creditor in cases in which it has a claim against the debtor in its capacity as an investor or other stakeholder. For all mandatory pension payments, AFIP is a creditor with a priority claim under Argentine Law, regardless of whether ANSES is the final beneficiary of such payments.

Even in insolvency proceedings where the Argentine government is not among the creditor constituencies, it may still play an important role in a company's debt restructuring efforts. In Argentina, for example, the attorney general has the right on behalf of the *Ministerio Público Fiscal* to intervene in *concurso*, APE or *quiebra* proceedings to ensure adherence to the law. In particular, the attorney general generally intervenes in *concursos* or *quiebras* where a debtor provides a public service in Argentina or where interruption of its services would cause significant disruption to Argentine society or economy.

Conclusion

A number of Argentine companies (particularly in the energy and infrastructure industries) have taken advantage of the revamped *concurso* and APE proceedings to restructure their international obligations. The number is expected to rise as Argentina continues to grapple with economic uncertainty and falling exchange rates. However, there are still numerous challenges inherent in the Argentine restructuring regime, including the fact that only debtors can file for *concurso* and APE proceedings, the lengthy nature of proceedings and the fact that secured creditors holding liens on any significant portion of a debtor's assets maintain significant leverage. Although APE proceedings offer a comparatively expedited path toward restructuring with a more limited role for the court, they have a relatively limited track record compared with pre-pack proceedings in other jurisdictions. Moreover, they also do not solve the stigma of insolvency filings that continues to exist in many jurisdictions. Although companies do not need to declare insolvency in order to initiate APE proceedings, distressed debtors often remain reticent to restructure through the LCQ for fear that it could have negative repercussions on the company's operations, relationship with suppliers, customers and potential future creditors and, where applicable, ability to bid for government contract opportunities. However, the APE at least offers debtors the ability, in the first instance, to use the availability of the proceedings to encourage participation of creditors in an out-of-court restructuring. The challenges and efficacy of Argentine APE proceedings will, no doubt, continue to be tried and tested in the years to come. ■

1. Argentina passed Law No. 25,589, which further amended the LCQ, on May 15, 2002.
2. For a plan to be approved, it must be approved by creditors representing at least a majority in number and two-thirds in outstanding amount of the unsecured class. See Section III below for further discussion.
3. The fact that "insolvency" is not a pre-condition to the filing of an APE does not mean that an insolvent debtor is excluded from using an APE to restructure its financial liabilities. Whether in such a case bankruptcy or insolvency events of default contemplated in concession agreements will be considered triggered is subject to debate, and to our knowledge has not yet been the subject of any judicial determination.
4. Although creditors may foreclose on certain types of security (e.g., certain trusts and pledges) without judicial assistance, under Argentine Law court oversight is generally required in connection with any auction process, including the appointment of an appraiser to determine the fair market value of assets for auction. The method by which courts determine the fair market value varies depending on the type of asset (e.g., securities, real estate or personal property). In the case of securities, for example, a forensic analysis is conducted to determine fair market value.
5. Creditors that enjoy statutory seniority (which may be general or limited to the proceeds of certain assets) are entitled to collect their claims from auction proceedings in accordance with the following order of preference: creditors with claims derived from the conversion, administration and liquidation of assets (e.g., trustee and attorneys' fees); creditors with a right to withhold a debtor's assets; creditors with claims derived from the construction or development of a debtor's assets; creditors with workers' compensation claims or claims relating to salaries or severance pay; tax creditors; and creditors secured by a mortgage, pledge, guarantee or bond secured by a guarantee.
6. During the five-day period following the filings and preceding the court's determination of eligibility, debtors remain vulnerable to lawsuits. Depending on the nature of the claims and whether the lawsuit is filed in a different jurisdiction within Argentina or with another court, such claims may be removed from the initial court once the judge presiding over the *concurso* proceedings makes the determination of eligibility.
7. The *pedido* is essentially a notice to the court, as no court approval or other action is required for the secured creditor to proceed with the foreclosure. However, if the secured creditor proceeds with the foreclosure prior to the court's verification of its respective claim, the secured creditor could be found to be liable to the debtor for damages in connection with the foreclosure.
8. Following a debtor's failure to consummate a *concurso*, creditors and interested third parties have five days to submit their names to the court's registry. Once the registry closes, the LCQ provides for thirty days for stakeholders to evaluate and agree upon the value of the company. Once the valuation is complete, creditors and third parties have twenty day to solicit support for their respective plans.

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