

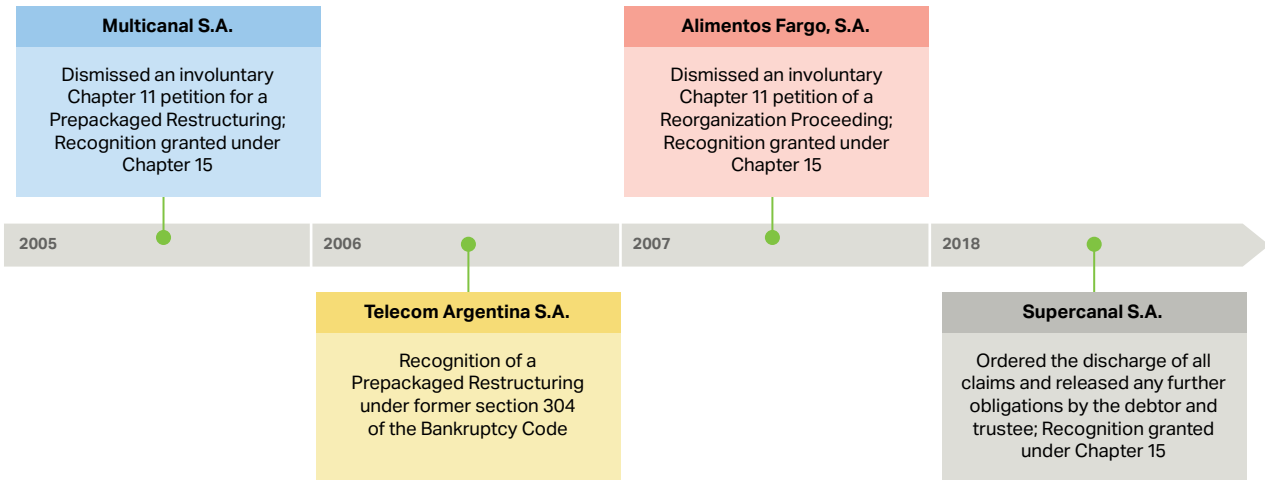
# Cross-Border Restructurings in Argentina: Making Inroads in Recognition by United States Bankruptcy Courts

By FERNANDO DANIEL HERNÁNDEZ



In 2001, Argentina suffered one of its largest and deepest systemic economic crises. The sudden sharp depreciation of the Argentine Peso caused the failure of hundreds of companies and gave rise to some of the largest cross-border corporate restructurings in Argentine history. This article provides an overview of the corporate restructuring process in Argentina and its implementation mechanics. The article then touches on how bankruptcy courts in the United States have consistently recognized Argentine restructuring proceedings, helping consummate the corporate restructuring process contemplated under Argentine law. We conclude by discussing the notable case of *In re Supercanal*, one of the longest-running restructurings in Argentine history that has recently been granted Chapter 15 protection and introduces innovative features to the cross-border restructuring process.

## Case Law Timeline



## Background on Cross-Border Restructurings in Argentina

After the Latin American debt crisis in the early 1980s, Argentina adopted a “convertibility plan” that pegged the Argentine Peso one-to-one to the U.S. dollar in 1991. The convertibility plan, along with other measures such as the privatization of public services, utilities companies and other government-owned enterprises, was initially successful, leading to considerable expansion of the Argentine economy. During this time, many of the largest companies in Argentina raised funds in the international capital markets through the issuance of U.S. dollar-denominated debt securities that were governed by New York law.

After a decade of the convertibility plan, however, the growth of the federal fiscal deficit provoked inflation and a sharp appreciation of the Argentine Peso that resulted in loss of industry competitiveness, a drop of exports, a higher trade balance deficit and loss of federal reserves, among other things, and the Argentine economy ultimately collapsed. By 2002, Argentina was forced to end the ten-year convertibility plan and the Argentine Peso suddenly depreciated more than three times. All companies that were highly indebted in U.S. dollar-denominated debt and had income in Argentine Pesos immediately increased their liabilities more than three times with no correlative increase of income and were then forced to enter into restructuring proceedings under the Argentine Bankruptcy Law (the “ABL”).

## Argentine Restructuring Proceedings

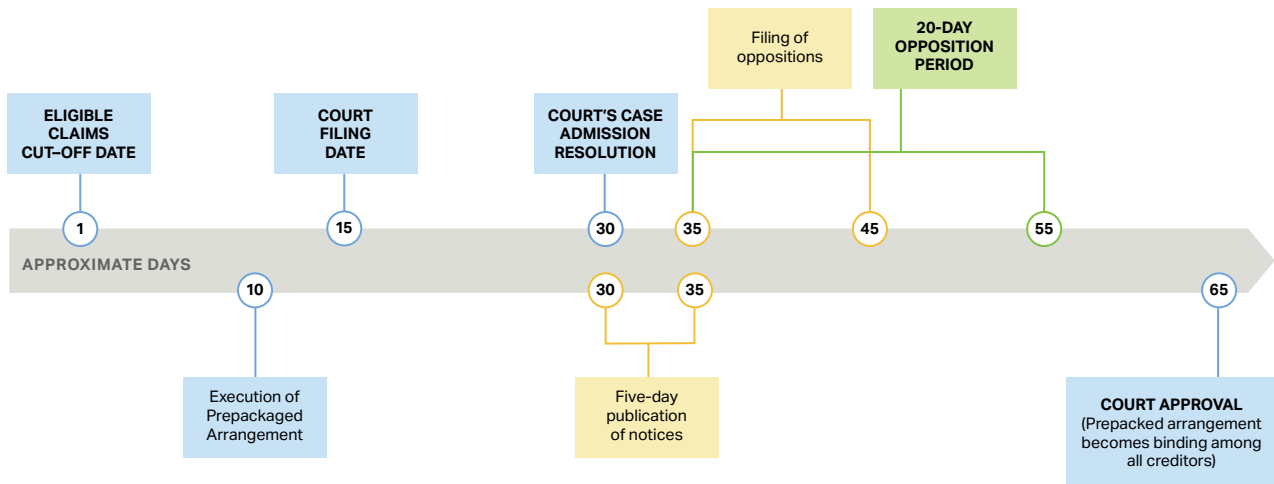
The ABL provides for two restructuring schemes: (i) the out-of-court restructuring agreement (*acuerdo preventivo extrajudicial*) (the “**Prepackaged Restructuring**”); and (ii) the in-court reorganization proceeding (*concurso preventivo*) (the “**Reorganization Proceeding**”).

### Prepackaged Restructuring

A Prepackaged Restructuring is similar to a prepackaged arrangement in the United States. It consists of an agreement entered into between the debtor and some or all of its unsecured creditors grouped into one or more categories determined by the debtor, with a single or different restructuring proposal for each category.

Prepackaged Restructurings may be filed before the court for endorsement if approved by the unsecured creditors representing both (a) more than 50% of the total number of unsecured creditors, regardless of the principal amount held by each creditor; and (b) more than 66⅔% of the total principal amount of unsecured claims (together, the “**Required Majority**”). The filing may be made by a debtor that is insolvent (i.e., generally unable to regularly satisfy its current liabilities) or by a debtor that is facing general economic or financial difficulties. Upon endorsement by the court, the Prepackaged Restructuring becomes binding against the unsecured creditors of all categories, whether they have consented to the restructuring or not.

**Prepackaged Restructuring Timeline**  
(in court business days)



A Prepackaged Restructuring may also include secured claims. However, the restructuring of secured claims requires the consent of all secured creditors.

Upon filing of the petition for endorsement of a Prepackaged Restructuring and verification of the admission requirements (i.e., filing of an assets and liabilities statement, a list of the creditors, a description of pending actions and proceedings and of a description of the consents to the Prepackaged Restructuring), the court will order the publication of notices for five days. Publication of such notices triggers a stay of all pre-petition claims against the debtor (other than claims of secured creditors seeking foreclosure on collateral).

Other than for the general principles of law (e.g., abusive proposal), the debtor is free to formulate the proposed terms of the restructuring agreement with its creditors. With certain limited exceptions, the ABL does not provide for a substantive review of the terms of the restructuring.

### Reorganization Proceeding

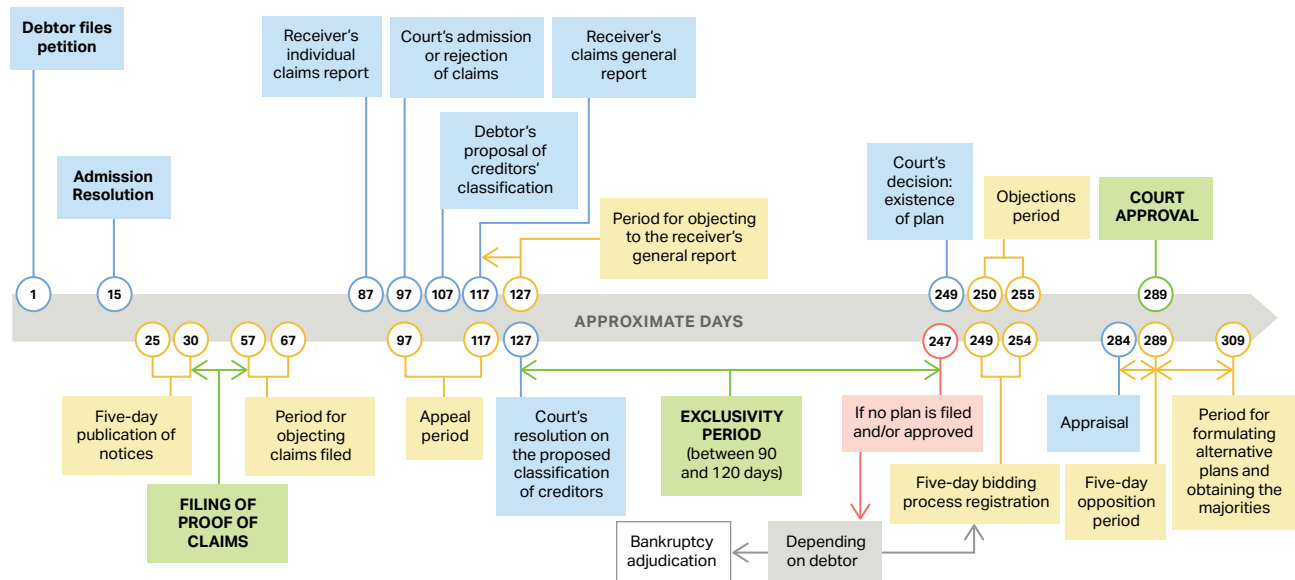
Reorganization Proceedings are full plenary proceedings similar to the reorganization procedure regulated under Chapter 11 of Title 11 of the United States Code (the “**U.S. Bankruptcy Code**”). Unlike Prepackaged Restructurings, a petition for a Reorganization Proceeding may only be filed voluntarily by a debtor that is insolvent. If the debtor has undergone a prior reorganization, a petition for a new Reorganization Proceeding may only be filed after one year from the date of the court’s declaration of the performance of the prior Reorganization Proceeding.

Pursuant to the ABL, any creditor holding claims due and payable may file a petition for bankruptcy of a debtor that is insolvent (involuntary bankruptcy petition). If the debtor is adjudicated bankrupt, they may avoid liquidation through filing a motion for the conversion of the bankruptcy proceeding into a Reorganization Proceeding, provided that bankruptcy was not adjudicated as a consequence of the breach or failure of a Reorganization Proceeding.

Commencement of a Reorganization Proceeding has the following main effects, among others:

- a. the court appoints a receiver to supervise the proceeding;
- b. the debtor keeps possession of its assets, but management is subject to the supervision of the receiver;
- c. all creditors must file proof of claims to the receiver;
- d. in case of need (e.g., enforcement actions on collateral indispensable for the development of the debtor’s business activities) or emergency, the court may order the temporary suspension of enforcement actions over secured claims and precautionary measures on collateral secured with mortgages or pledges for a period of up to ninety days. Interest accrued during the suspension period will benefit from the same priority of payment as administrative expenses;
- e. the debtor is banned from entering into any transactions without consideration (*a titulo gratuito*) or other transactions that may affect the status of pre-petition claims;

### Reorganization Proceedings Timeline (in court business days)



- f. within ten days following the filing by the receiver of a report on labor claims, the court authorizes the “prompt payment” of such labor claims without need for filing proof of claims;
- g. any of the following transactions require the prior authorization of the court, following a hearing with the receiver and the creditors’ committee: (i) transactions concerning registered property; (ii) disposition or lease of goodwill; (iii) issuance of secured debentures or bonds; (iv) granting of pledges; and (v) any other transaction not within the ordinary course of the debtor’s business; and
- h. accrual of interest is suspended on pre-petition unsecured claims. Interest accrued after the Reorganization Proceeding petition on claims secured with a mortgage or pledge is payable only with the proceeds from the enforcement of the collateral.

The debtor must classify the creditors into at least three classes: unsecured creditors, labor creditors and secured creditors, provided that the debtor may create additional subcategories within each class based on objective criteria set by the debtor. The debtor could formulate a reorganization plan including different restructuring proposals for each class and/or subcategory. The debtor enjoys a ninety-day exclusivity period (extendable up to thirty additional days from the date of the court’s resolution admitting the debtor’s proposed creditor classification) during which it must formulate a reorganization plan and obtain the creditors’ consent (the “**Exclusivity Period**”).

As with a Prepackaged Restructuring, the reorganization plan must be approved by unsecured creditors (excluding those who are also controlling shareholders) representing the Required Majority of unsecured creditors within each class and/or subcategory. Any proposal to secured creditors must be approved by unanimous consent of all creditors within the class and/or subcategory of secured creditors.

If at expiration of the Exclusivity Period the debtor did not file a reorganization plan, or such plan is not approved, then prior to resolving the bankruptcy adjudication (if applicable), the court must open a bidding process in which the debtor, the creditors, the debtor’s workers organized in a cooperative and/or other third parties may file biddings for the purchase of the debtor’s shares, quotas or participations and offer alternative reorganization plans. If the bidding process fails, then the court must declare the debtor bankrupt.

Only the workers who are organized in a cooperative may offset their labor claims against the bidding price for the purchase of the debtor’s equity.

Despite the foregoing, Argentine courts have been eager to extend the Exclusivity Period for a longer period, and also to grant the debtors a second chance to improve their reorganization plans and obtain the Required Majority on such improved plan before launching the bidding process. This extension of the Exclusivity Period has been called the “third way”.

Once the reorganization plan is endorsed by the court, and the debtor has adopted the measures for its implementation and granted guarantees for the performance of its obligations under the reorganization plan to the satisfaction of the court, the court will issue, at the debtor's request, a resolution declaring the Reorganization Proceeding concluded (the "**Conclusion Resolution**"). Once the Conclusion Resolution is granted, the Reorganization Proceeding is finalized, the receiver's performance and duties are terminated and the management limitations on the debtor are lifted.

Upon tender and delivery of all consideration under the reorganization plan, and fulfillment of all other obligations of the debtor under the plan, the court will issue a resolution confirming the performance and discharge of the debtor's obligations under the plan (the "**Performance Resolution**").

## Implementing Prepackaged Restructurings and Reorganization Plans

A major portion of the unsecured debt in the largest corporate restructurings in Argentina involve large amounts of debt securities deposited with a trustee in the United States clearing system administered by The Depository Trust Company ("**DTC**"), and governed by New York law (the "**Debt Securities**").

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Since the earliest cases were brought in 2001, the SDNY Bankruptcy Court has consistently granted recognition, relief and assistance with respect to both the Prepackaged Restructuring and the Reorganization Proceeding under Chapter 15 of the U.S. Bankruptcy Code and its predecessor section 304 of the U.S. Bankruptcy Code.

The Debt Securities are eligible for trading in the DTC system, and beneficial ownership is held by the beneficiaries through custodians that are, or hold their positions in the Debt Securities through, direct participants in the DTC system (the "**DTC Participants**"). Therefore, the only holders of the Debt Securities known to the issuer are the DTC Participants, who hold the positions in their own name or account or in the name or account of their clients (including custodians holding the positions in the names of their respective clients).

In order to take any action with respect to the DTC Participant's third-party positions, the DTC Participants need to receive adequate instructions from the beneficial owners. Due to the characteristics of the custody system, in all restructurings there is always a certain portion of beneficial owners that will never give instructions on their positions and cannot be identified by the issuer, the trustee or the DTC Participants (the "**Non-consenting Creditors**").

## The Implementation Process

The implementation mechanics of the Prepackaged Restructurings and reorganization plans depend on the nature of the unsecured claims and the consideration to be delivered under the restructuring agreement or plan.

Under Argentine law, Prepackaged Restructurings and reorganization plans may include a variety of consideration, such as cash, DTC eligible securities or non-DTC eligible securities.

### DTC Eligible Debt Securities

To the extent the unsecured claims relate to Debt Securities that are DTC eligible and the consideration under the Prepackaged Restructuring or reorganization plan consists of cash or other DTC eligible securities, the exchange of the securities for the cash or new securities can be performed through the DTC settlement system. This involves the debit of the positions in the debt securities and the credit of the cash or new securities at the DTC accounts and each beneficial owner's custody account.

Consent to the Prepackaged Restructuring or reorganization plan by the holders of Debt Securities is generally implemented through a tender process whereby the consenting creditors tender their Debt Securities to an exchange agent. The exchange agent's endorsement of the Prepackaged Restructuring or reorganization plan implements the exchange of the Debt Securities and delivers the consideration under the Prepackaged Restructuring or reorganization plan.

Where consent to the restructuring is not sought through a tender process, then upon endorsement of the Prepackaged Restructuring or reorganization plan each of the beneficial owners will have to instruct their DTC Participant to tender their Debt Securities to receive the consideration under the exchange.

In this instance, an issue arises with respect to the Non-consenting Creditors, where trustees generally refuse to exchange and cancel their Debt Securities without an order of a U.S. court.<sup>1</sup> Debtors thus petition U.S. courts for recognition under the former section 304 and new Chapter 15 of the U.S. Bankruptcy Code in order to instruct the trustee to exchange and cancel the Debt Securities of the Non-consenting Creditors.



***In re Supercanal* marks the first instance where an Argentine company sought discharge of pre-petition claims and release of delivery obligations under a reorganization plan upon elapse of the statute of limitations by a U.S. bankruptcy court and the U.S. bankruptcy court granted such relief.**

## Non-DTC Eligible Securities

Where the consideration under the Prepackaged Restructuring or reorganization plan includes securities that are not DTC eligible (e.g., stock registered on the issuer's or other registrar's records) (the "Non-DTC Eligible Securities"), the exchange process cannot be implemented through the DTC settlement system. Beneficial owners must deliver, or cause to be delivered, their Debt Securities with the instructions of the beneficiary in whose name the Non-DTC Eligible Securities are registered.

## Discharging the Debtor's Obligations

Pursuant to the ABL, the endorsement of the Prepackaged Restructuring or reorganization plan causes the discharge of all pre-petition unsecured claims such that the original rights of the unsecured creditors to receive payment under those claims is automatically replaced by the right to receive consideration under the restructuring. In addition, the debtor's performance obligations under the Prepackaged Restructuring or reorganization plan are discharged (and the Performance Resolution is granted by the court) following the tender of the consideration for the exchange of debt securities.

The ABL does not stipulate a statute of limitations for the delivery of the consideration under a Prepackaged Restructuring or reorganization plan. Therefore, such statute of limitations is governed by the general provisions of the Argentine Civil and Commercial Code. The generic statute of limitations term is five years,<sup>2</sup> and is computed from the date when the consideration is first made available to all unsecured creditors. Upon expiration of this term, all claims of the unsecured creditors that did not tender their Debt Securities in exchange for the consideration under the Prepackaged Restructuring or reorganization plan to claim the delivery of the consideration are barred and those creditors' outstanding Debt Securities must be cancelled. Trustees are typically reluctant to cancel the Debt Securities of those holders absent an order from a U.S. court.

However, in the recent case of *In re Supercanal*,<sup>3</sup> the United States Bankruptcy Court for the Southern District of New York ("SDNY Bankruptcy Court") took a new, more affirmative approach to granting recognition and relief under Chapter 15 of the U.S. Bankruptcy Code. Consideration under the reorganization plan is tendered and made available to the creditors with receipt conditioned upon the performance of certain affirmative actions by the creditors that are never taken.

The following is a survey of some of the leading recognition cases brought to U.S. courts and discusses the monumental decision in the aforementioned *Supercanal* case.

## Recognition of Argentine Restructuring Proceedings in the United States

Since the earliest Argentine cases were brought in 2001, the SDNY Bankruptcy Court has consistently granted recognition, relief and assistance with respect to both the Prepackaged Restructuring and the Reorganization Proceeding under Chapter 15 of the U.S. Bankruptcy Code and its predecessor section 304 of the U.S. Bankruptcy Code.<sup>4</sup>

For example, *In re Compañía de Alimentos Fargo, S.A.*, 376 B.R. 427 (Bankr. S.D.N.Y. 2007), dismissing an involuntary Chapter 11 petition in connection with a Reorganization Proceeding pending in Argentina, the SDNY Bankruptcy Court noted that "the Argentine insolvency system is procedurally and substantively fair, and provides a suitable forum to adjust the rights of the parties... Given this structure, it is not surprising that other courts in this district have granted comity to Argentine bankruptcies even though Argentine bankruptcy law is not identical to our own...[t]he Petitioners... have failed to show that these differences are at odds with our own fundamental notions of fairness or treat them unfairly..."

Similarly, *In re Argentinian Recovery Co. v. Bd. of Dirs. of Multicanal S.A.*, 331 B.R. 537, 540 (S.D.N.Y. 2005), dismissing an involuntary Chapter 11 petition in connection with a Prepackaged Restructuring, the court noted that the U.S. Bankruptcy Code gives the court discretion to dismiss a bankruptcy case when "the interests of creditors and the debtor would be better served by such dismissal ...", for which purpose the court has to consider "whether another forum is available and whether another proceeding has proceeded to the point that it would be costly and time-consuming to start afresh under the Bankruptcy Code."

In another example, *In re Bd. of Dirs. of Telecom Argentina S.A.*, 2006 WL 686867 at \*2 (Bankr. S.D.N.Y. Feb. 24, 2006), leading telecommunications group Telecom Argentina had a Prepackaged Restructuring already approved by an Argentine court, but the trustee of the company's notes



that were subject to the restructuring refused to exchange and cancel those notes absent an order from a U.S. court, and Telecom filed a petition for recognition under former section 304 of the U.S. Bankruptcy Code. The court found the recognition “*especially appropriate where, as here, the Argentine Court has issued a final judgment that the APE (Argentina’s out-of-court restructuring process) meets the requirements of Argentine Insolvency Law, and that judgment is final and binding on all affected creditors as a matter of Argentine law.*”

### **In re Supercanal S.A.**

By the end of the 1990s, Supercanal S.A. and certain of its subsidiaries were highly indebted in U.S. Dollars. Severely affected by the Argentine economic crisis, the company filed for a Reorganization Proceeding in 2000. The company’s proposed reorganization plan included the exchange of pre-petition Debt Securities for Non-DTC Eligible Securities. After the reorganization plan was approved and endorsed by a final resolution of the Argentine court, and the company fulfilled its obligations and tendered the Non-DTC Eligible Securities, the Argentine court declared the Reorganization Proceeding concluded and the reorganization plan satisfied through the issuance of a Conclusion Resolution and Performance Resolution. The company, under the reorganization plan, agreed to tender and make the Non-DTC Eligible Securities available to creditors for the term of the statute of limitations. In order to have the Debt Securities cancelled by the trustee upon expiration of the statute of limitations, the company filed a petition for recognition of the Reorganization Proceeding by the SDNY Bankruptcy Court.

### **Innovative Chapter 15 Relief**

On July 19, 2018, the court granted the Chapter 15 motion and all relief requested. In granting such order, the court found that

*“[absent] a permanent injunctive relief, the Foreign Proceeding and the Debtor’s efforts to consummate its reorganization plan may be delayed or impaired by the actions of certain creditors, or by the failure of certain parties to take actions necessary to consummate the reorganization plan. Such results are at odds with the purpose of Chapter 15 of the Bankruptcy Code.... and could threaten, frustrate, delay, and ultimately jeopardize the reorganization plan and the Debtor’s ability to have a fresh start following its Foreign Proceeding.”*

Upon those findings, the court granted the Chapter 15 petition and, among other things, ordered that

*“the [Debt Securities] have no further force, effect and the holders have no right to receive any further cash payments on the [Debt Securities]. The sole right of the holders thereof is to exchange the [Debt Securities] for the Class A Shares... The Debtor and U.S. Intermediaries (including the Trustee) are hereby authorized and directed to take any ministerial actions that may be necessary to consummate the transactions contemplated by the reorganization plan.”*

In a positive response to the express petition by Supercanal, after over two decades of recognition proceedings granted by U.S. courts, the Supercanal decision finally directly ordered the discharge of all claims and release of any further obligations by the debtor, securities' trustees and other securities intermediaries, where the exchange of Debt Securities could not have otherwise been achieved without action by the beneficial owners. This decision has introduced new features to Chapter 15 recognitions and scope of relief that will facilitate consummating Prepackaged Restructurings and reorganization plans in the years to come.

## Conclusion

The court's grant of Supercanal's petition constitutes a milestone in the scope of relief granted under Chapter 15 recognitions. This case marks the first instance where an Argentine company sought discharge of pre-petition claims and release of delivery obligations under a reorganization plan upon elapse of the statute of limitations by a U.S. bankruptcy court and the U.S. bankruptcy court granted such relief. This decision thus provides certainty on the discharge of all parties' obligations in reorganizations where the consideration cannot be delivered to the creditors without the performance of an affirmative action by them and will have a significant positive impact on future Argentine-US cross-border cases, Chapter 15 petitions and the formulation of debtors' reorganization proposals. ■

1. See *In re Bd. of Dirs. of Telecom Argentina S.A.*, 2006 WL 686867 at \*2 (Bankr. S.D.N.Y. Feb. 24, 2006) below.
2. §2560 of the Argentine Civil and Commercial Code.
3. *In re Supercanal S.A.*, Debtor in a Foreign Proceeding.
4. See e.g., *In re Bd. of Dirs. of Compañía General de Combustibles S.A.*, 269 B.R. 104, 107 (Bankr. S.D.N.Y. 2001); *In re Bd. of Dirs. of Multicanal S.A.*, 314 B.R. 486 (Bankr. S.D.N.Y. 2004); *aff'd and remanded*, 331 B.R. 537 (S.D.N.Y. 2005); *The Argo Fund Ltd. v. Bd. of Dirs. of Telecom Argentina, S.A. (In re Bd. of Dirs. of Telecom Argentina S.A.)*, No. 06 Civ. 2352 (NRB), 2006 WL 3378687 (S.D.N.Y. Nov. 20, 2006); *In re Compañía de Alimentos Fargo, S.A.*, 376 B.R. 427 (Bankr. S.D.N.Y. 2007); *In re Bd. of Dirs. of Telecom Arg.*, 2006 WL 686867, *aff'd*, Telecom Arg., 528 F.3d 162 (2d Cir. 2008); *In re Cablevisión S.A.*, Case No. 04-15697 (SMB) (Bankr. S.D.N.Y. October 23, 2009); *In re Rede Energia S.A.*, 515 B.R. at 93 (citing Telecom Arg., 528 F.3d at 174-76); *In re Sino-Forest Corp.*, 501 B.R. 665 (Bankr. S.D.N.Y. 2013); *In re Metcalfe & Mansfield*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010); and *In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650 (Bankr. S.D.N.Y. 2016).



▼ **Fernando Daniel Hernández** is a partner at Marval, O'Farrell & Mairal. He joined the firm in 2002 and became partner in 2011. Since 2015, Fernando is the head of Marval, O'Farrell & Mairal's insolvency and restructuring department.

During the last several decades, Fernando has been involved in advising either the debtor or creditors in some of the major international financial restructurings, out-of-court restructuring agreements and reorganizations, including the Supecanal S.A.'s reorganization Chapter 15 petition; the USD 135 million Inversora Eléctrica de Buenos Aires S.A. out-of-court restructuring; the KLP Emprendimientos S.A. reorganization; the Sociedad del Plata reorganization; the Supercanal S.A. USD 104 million reorganization and USD 305 million principal amount secured notes cancellation; the USD 800 million Cablevisión S.A. out-of-court restructuring and the USD 150 million Compañía de Alimentos Fargo S.A. reorganization.

Fernando has advised both debtors and creditors, has a large experience in cross-border reorganizations and is skilled in advising on complex restructuring cases. With a high level of experience in corporate finance and capital markets, Fernando's knowledge of insolvency proceedings is complemented by his demonstrated knowledge and experience in financial matters. His extensive experience in both procedural and finance matters gives him an integral view of restructurings and allows Fernando to add great value to the planning of process strategies and the formulation of reorganization proposals.

Fernando wrote many articles in the matters of his specialization, both domestic and international, and is a member of the Buenos Aires Bar Association, the American Bar Association, INSOL International, the International Insolvency Institute and the American Bankruptcy Institute. He received his law degree from the Buenos Aires University School of Law in 1994 and obtained an LL.M. at Columbia University School of Law in 2001.