

## REPORT ON THE OBSERVANCE OF STANDARDS AND CODES (ROSC)

**ARGENTINA****INSOLVENCY AND CREDITOR RIGHTS SYSTEMS**

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**Executive Summary**

A four-year Argentine recession has tested the limits of effectiveness of conventional debt resolution mechanisms, such as by individual enforcement actions or the collective proceedings under the new insolvency law adopted in 1995. With some refinements, these systems should have been able to sustain the balance and confidence in commercial relationships through the current crisis, considered to be deeper than those recently experienced in Mexico, East Asia (excepting Indonesia) and Turkey. On February 2002, creditor rights and insolvency mechanisms were dealt a significant blow by Law 25.563, one of the emergency measures recently adopted to help stabilize the corporate sector, imposing a six month automatic injunction against creditor actions to recover debt. A significant advance to restore a level playing field for debtor-creditor relationships has been obtained with the enactment of the Law 25.589 on May 16, 2002. This law repealed most of the emergency measures of Law 25.563 and reinstated relevant provisions of Insolvency Law 24.522 that had been derogated or were under suspension.

The general framework for creditor rights has been relatively structurally sound and effective in recent years. Security interests in immovable and movable assets were reasonably well protected through individual enforcement actions and in insolvency proceedings. Securities on intangible assets are not well developed due to uncertainties in the laws applicable to pledges. The process of enforcing unsecured claims typically takes 1½-3 years (longer in some jurisdictions), although procedures exist for accelerated decision-making, resolution and arbitration. Judicial foreclosure proceedings previously averaged 12-15 months, but now average 3-6 months under a new special regime supporting non-judicial foreclosure.

In 1995, Argentina enacted a new modern insolvency law that substantially improved corporate liquidations and rehabilitations. After almost seven years of experience, some legal and institutional weaknesses persist: (i) corporate workouts are difficult in practice; (ii) the unified insolvency regime causes severe problems in judicial interpretation of many legal provisions, causing court congestion with insolvency cases; (iii) an uneven playing field discourages rehabilitation; (iv) a lack of insolvency specialization among judges impedes efficiency and uniformity in large commercial centers; and (v) “*sindicados*” are perceived as lacking objectivity and sufficient expertise to manage complex restructurings. Liquidation proceedings take 1-5 years (depending on complexity), while reorganizations average 1½-2 years in jurisdictions with specialized judges (Mendoza, Córdoba) and 2-3 years in the others. To immediately improve the system, a new workout mechanism should be introduced to deal with systemic levels of corporate distress. In the medium term, other aspects of the legal and institutional framework should be improved.

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## I. INTRODUCTION

1. The assessment of Argentine insolvency and creditor rights systems was conducted pursuant to a joint IMF-World Bank initiative on observance of standards and codes (“ROSC”) in connection with a World Bank mission from February 13-March 1, 2002 to review the sufficiency of debt resolution mechanisms for coping with the current crisis. The assessment was carried out using the World Bank *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (“Principles”).<sup>2</sup>

2. The conclusions in this assessment are based on a review of the Bankruptcy Law (*Ley de Concursos y Quiebras* 24.522 or “LCQ”), the laws dealing with the creation registration and enforcement of pledges and security interests (e.g., Civil Code, Commercial Code, Civil and Commercial Procedure Codes), other relevant legislation, the Emergency Law 25.563 and the recently enacted Law 25.589. In addition to the review of legislation, regulations and related information, the conclusions in this assessment are based on a wide range of meetings with a cross section of country stakeholders and institutions in the public and private sectors.

## II. DESCRIPTION OF COUNTRY PRACTICE

3. **Legal mechanisms for debt resolution (e.g., enforcement and insolvency procedures) foster commercial confidence and predictability by enabling markets to more accurately price, manage and resolve default risk.** Financial institutions rely on effective creditor rights to reduce deterioration of asset values and promote credit access generally. In times of economic crises, these systems also serve as a safety valve for corporate distress, establishing a means for efficient rehabilitation of viable enterprises and preservation of jobs and, where businesses are non-viable, enforcement and liquidation procedures offer a means to quickly transition assets to more efficient market users. These systems also establish checks and balances in commercial relationships through incentives that encourage responsible corporate behavior and governance and through disincentives that penalize debtors and their management who lack financial discipline or behave irresponsibly. As such, they constitute an essential cornerstone of commercial confidence and the bedrock for sound credit management and resolution.

4. **In recent years, mechanisms for debt recovery and enforcement of secured and unsecured credit have functioned relatively well, although there is clearly scope for improvement. Adoption of the Argentine Social Credit and Emergency Law 25.563, however, reverted recent efficiency gains and heavily skewed the legal environment in favor of debtors, creating a corporate safe-haven that would have catalyzed the death of credit.** The mentioned law preempted longstanding and well-settled jurisprudence supporting predictable commercial relationships and stood corporate governance on its head. While the Emergency Law understandably aimed at stabilizing the corporate sector against a rapid deterioration, it did so at the expense of the commercial sector that provides credit and capital that stoke the engine for growth of a modern economy. With a de facto 10 month grace period, corporate debtor’s had little or no incentive to pay their debts (even if able) or to engage in voluntary workouts. Some of the more serious setbacks for creditors and financial institutions under the current law were:

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<sup>2</sup> World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (April 2001) <<http://wbln0018.worldbank.org/Legal/GILD/csadmin.nsf/wblaunchtext?readform&Best+Practices>>

- creation of a broad moratorium that suspended executions in bankruptcy proceedings, nearly all individual executions and some precautionary measures;
- derogation of article 48 of the bankruptcy law (the “salvataje” or Argentine cramdown), the effect of which prevented creditors and third parties from negotiating a plan with the creditors of the reorganizing corporation.
- erosion of the effect and extension of guarantees previously granted to creditors.

5. **On May 16, 2002 a new Law 25.589 was enacted, with significant impact on insolvency and creditor rights legislation. This law repealed most of the emergency measures of Law 25.563<sup>3</sup> and modified articles 10 and 16 of said law. At the same time, Law 25.589 reinstated the provisions of the Insolvency Law 24.522 that were suspended or derogated<sup>4</sup> by Law 25.563 and also introduced some new provisions to the Insolvency Law 24.522<sup>5</sup>.** The abrogation of almost all the moratoria provisions of the Emergency Law 25.563 has the immediate effect of reinstating the previous status quo on the legal framework for creditor rights enforcement actions. It is worth noting, however, that the extension of terms effectively granted by judges during the period where the original version of the Law 25.563 was in force, will remain as consolidated rights of the party benefited by those emergency measures. The new Law 25.589 is a significant advance to restore a level playing field for debtor-creditor relationships. It also provides for some interesting new rules to the Argentine insolvency system, which should be followed up by further and more refined amendments in next steps of the reform process.

#### A. CREDITOR RIGHTS AND ENFORCEMENT PROCEDURES

6. **Argentina’s legal environment for creditor rights and debt enforcement has been reasonably effective in recent years for both unsecured and secured creditors.** The Civil and Commercial Procedure Codes govern enforcement of unsecured claims. There is a “national” Civil and Commercial Procedure Code, applicable to cases under the federal judiciary, and the civil and commercial courts of Buenos Aires. Civil and Commercial Procedure Codes also exist for each of the 23 Argentine provinces. Nevertheless, the provisions regarding enforcement actions of unsecured rights are not significantly different throughout the 24 codes.

7. Unsecured claims fall into two categories for purposes of execution: those by law entitled to an executory process (*proceso ejecutivo*) and those devoid of such rights. The executory process (*proceso ejecutivo*) has a number of advantages for qualifying claims, including access to expedited summary proceedings<sup>6</sup>. Creditors not entitled to execution are obliged to pursue

<sup>3</sup> Articles 2 to 9, 11, 15 and 21 of Law 25.563 were repealed.

<sup>4</sup> Articles 50, 51 and 55 of the Law 24.522 were reinstated without modifications. Articles 39, 43, 48, 49, 52, 53, 69, 72, 73, 75, 76 and 190 of the Law 24.522 were reinstated with some modifications.

<sup>5</sup> The new provisions are articles 32 *bis* and 45 *bis*.

<sup>6</sup> The executory process has some advantages to the claimant: (i) a right to obtain attachment or garnishment orders on the debtor’s assets without posting a bond (art. 531); (ii) a severe restriction on the availability of defenses (art. 544); (iii) the debtor bears the burden of proof on facts regarding redemption of the debt (art. 549); (iv) the right of appeal is restricted (art. 554); and, (v) the claimant can obtain immediate execution on a debtor’s assets of a judgment under appeal if a sufficient bond is furnished (art. 555). The final judgment rendered in an executory process has a preliminary nature; the debtor being able to introduce a further procedure (*juicio ordinario posterior*) wherein all defenses not arguable under the restrictive executory process rules may be alleged (art. 553).

recovery by a more protracted process of full cognizance (*proceso de conocimiento pleno*), wherein all defenses and all types of evidence are made readily available to the debtor. The processes typically averages 1½-3 years (longer in some jurisdictions), although procedures exist for accelerated decision-making, resolution and arbitration.

8. **The legal framework for secured rights is largely complete, although laws applicable to pledges are somewhat outdated for securities on intangible property.** Argentine law provides for a variety of secured rights – all of which are *in rem* rights – that entitle the claimant to “special” priority and access to an accelerated recovery process (*procesos ejecutivos*). The most commonly utilized security devices include: (i) mortgage or hypothecary right on immovable property; (ii) pledge on movable assets, comprising both the common pledge (*prenda común*) and the registered pledge (*prenda con registro*); (iii) warrants, that is a security interest on merchandise deposited in specifically licensed warehouses; (iv) debentures containing a right *in rem*, which are regulated both in the *Ley de Sociedades* (Partnership and Corporations Law) 19.550, and in the *Ley de Obligaciones Negociables* (Negotiable Obligations Law) Laws 23.576 and 23.962; (v) naval mortgage or hypothecary right on ships; (vi) aeronautical mortgage or hypothecary right on aircrafts. In addition, security can take the form of lease transactions (Law 25.248) or a fiduciary guarantee (*fideicomiso de garantía*) under Law 24.441.

9. **The system for recording and registering mortgages is expensive, especially in jurisdictions where the local (provincial) authorities levy stamp taxes. The absence of a single national Land Office Registry, as well the plurality of Public Commercial Registries, make the access to information difficult and costly.** To be legally valid, a mortgage must (i) be memorialized by public deed executed by the debtor and the creditor before a Notary Public in Argentina; (ii) fully describe the property and its registration number given by the Land Office Registry (*Registro de la Propiedad*) having jurisdiction over the property; and (iii) be recorded in the property registration with the competent Land Office Registry. If additions or changes are made to the mortgaged property, the mortgage deed must be amended, signed by both parties before a Notary Public, and recorded with the competent Land Office Registry. Registries are local and each province has its own office, as does the Federal Capital (*Ciudad de Buenos Aires*).

10. **Pledges of movable property are registered in a centralized national registry, called the National Pledges and Cars Registry (*Registro Nacional de la Propiedad Automotor y de Créditos Prendarios*).** The National Pledges registry has offices in all important cities in Argentina (some 270 offices for pledges and some 700 hundreds offices for autos). Pledge agreements for patents or trademarks must be further recorded in the Argentine National Registry of Intellectual Property. Stock pledges are registered with the Public Commercial Registry (*Registro Público de Comercio*) and also must be recorded in the corporate books of the company. Mortgages on aircraft and ships are recorded in their particular registry.

11. **Rights *in rem* are entitled to accelerated execution (*procesos ejecutivos*).** Judicial foreclosure proceedings previously averaged 12-15 months, but now averages 3-6 months under a new special regime supporting non-judicial foreclosure. In insolvency proceedings, creditors holding a right *in rem* have: (a) the right to force the sale of the debtor's specific property involved under particularly strict procedures; (b) a special priority on the proceeds of that sale; and, (c) the *ius perseguendi* whenever that property has been transferred to third parties. In principle, these creditors may not take title to the debtor's property. Secured creditors and creditors with rights *in rem* are particularly protected under the LCQ, and jurisprudence has

consistently recognized these rights. In the periods of heavy inflation, secured creditors were first to be granted indexation, both by the law and by the courts. LCQ grant a special priority for debts secured with: (i) a hypothecary right; (ii) a pledge; (iii) a warrant; (iv) a debenture with a right *in rem*; (v) a naval hypothecary right; and, (vi) an aeronautical hypothecary right.

## B. LEGAL FRAMEWORK FOR CORPORATE INSOLVENCY

12. **The Argentine insolvency framework is reasonably integrated with the country's broader legal and commercial systems.** In 1995, Argentina introduced a new more modern bankruptcy law providing for liquidation and reorganization proceedings. The law applies both to natural persons and artificial persons or *juridical personae*. LCQ is also applied to government owned corporations and other state companies. The "*Ley de Entidades Financieras*" 21.526 as of February 14, 1997 (modified by Laws 24.144, 24.485, 25.562, and by Decree No. 214/02) establishes significant modifications to the LCQ for the liquidation of insolvent banks and financial institutions. The "*Ley de Ejercicio de la Actividad Aseguradora*" 20.091 as of February 7, 1973, establishes slight modifications to the LCQ with respect to the liquidation of insolvent insurance companies. Neither insolvent banks nor insolvent insurance companies are entitled to file for reorganization proceedings. The "*Ley de Régimen Especial de Administración de las Entidades Deportivas con Dificultades Económicas*" No. 25.284 as of July 25, 2000, establishes a trust ("*Fideicomiso de Administración con Control Judicial*") under judicial control for the administration of sporting clubs in liquidation or reorganization, thus modifying several rules of the LCQ regime. "*Fideicomisos*" (trusts ruled by "*Ley de Fideicomiso*" 24.441 as of December 22, 1994) and pension fund companies (ruled by "*Ley del Sistema Integrado de Jubilaciones y Pensiones*" 24.241 as of September 23, 1993) are entities completely excluded from the LCQ regime.

13. **The liquidation process generally contains modern features, but has been marked by inefficiencies.** LCQ establishes proceedings for liquidation (*quiebra*) and reorganization (*concurso preventivo*), allowing conversion from one to the other. A liquidation petition may be filed either by a debtor (voluntary) or by a creditor (involuntary or necessary), or can follow from conversion of a frustrated reorganization effort. Grounds for opening a proceeding are based on the cash flow or liquidity test, and a petitioner must demonstrate cessation of payments (defined as impossibility to pay debts, whatever their nature and the underlying causes of non-performance). The declaration of liquidation (*quiebra*) or reorganization (*concurso preventivo*) automatically suspends any undecided or pending individual actions or collection suits filed by creditors with regard to rights and interests in the bankrupt estate. In addition, a stay is imposed on the calculation of interest. Liquidations are concluded in one of three main ways: (a) In those cases in which there are no assets, the "*síndico*" will file a petition with the court for the conclusion of the procedure and the case will be closed ("*clausura por falta de activo*"); (b) When the debtor has obtained the unanimous consent of all creditors ("*avenimiento*"); and, (c) After the selling of all assets at auction, bidding, privately, or otherwise in a manner designed to achieve the maximum amount to be distributed to creditors. Although the law specifies that all sales conducted in liquidation proceedings are to be finalized within four months from the opening of the proceeding – a period that is patently unrealistic – in practice, the process typically takes from 1-3 years, with the period extending with the complexity of the case. There are discrepancies in the perceptions about the duration and return rates to creditors, although returns to unsecured creditors are expectedly low. No doubt, some of the cause for the

inefficiencies lies with the courts and ineffective *sindicos*, while in other part the long recession has decreased market liquidity.

14. **Reorganization proceedings are reasonably modern and largely consistent with best practice, with inefficiencies being mainly attributable to problems in implementation.** Only a debtor can petition for a reorganization proceeding. The petition for reorganization is deemed sufficient evidence of the debtor's confession to a cessation of payments. The debtor maintains control of his assets and continues to operate his business under the surveillance of the "*síndico*". The debtor cannot engage in transactions that are gratuitous or outside the ordinary course of business, without court authorization. Neither can the debtor satisfy prepetition claims or otherwise alter the situation of creditors with respect to prepetition claims. Argentine law envisages reorganization as a remedy to "prevent" liquidation, yet involving all creditors in the proceedings. As in a liquidation, the proceeding automatically imposes a stay on executions and a suspension on lawsuits against the debtor, with some exceptions.

15. When filing for a *concurso preventivo*, the debtor must give reasons of his economic situation, indicating the date his cessation of payments began, attaching a detailed report identifying assets and liabilities. The report of assets and liabilities must be attested by an accountant, and accompanied by balance sheets, formal list of creditors stating the amount, reasons and priority of their debts. The debtor must also indicate all judicial or administrative processes where he is a party. Throughout the reorganization proceeding the "*síndico*" has a function that is essential as to the determination of the debtor's liabilities due to the fact that he receives and examines the proof of claims filed by creditors; and counsels the judge as to them ("*informe individual*"). The "*síndico*" also must produce a "general report" ("*informe general*") expressing his opinion about the probable value of the assets, the management of the insolvent corporation and others.

16. The debtor may divide his creditors in classes, which must satisfy the test of reasonability in order to be approved by the judge. The debtor has an exclusive period (30 to 60 days) during which he enjoys the exclusive right to make proposals for a plan to creditors, and to obtain the majority of their approvals. The plan of the debtor shall contain equal terms for creditors within each class of creditors, but differing terms can be contained in plans to creditors of different classes. Alternative proposals are also to be admitted, but each creditor shall make his option at the time of his individual acceptance of the plan. The new articles 32 *bis* and 45 *bis* establish rules allowing claims-verification of bondholders and permitting them to vote on restructuring plans<sup>7</sup>. A special provision limits the voting rights of insiders. If contemplated in the plan, special privileged creditors affected shall give a unanimous vote. There is only one requisite majority for common (unsecured) and general privileged creditors: (a) A majority in the number of creditors within each and every category; and, (b) Such creditors shall be representative of two-thirds of the requisite capital within each category. Provided it is also approved by the judge, the plan approved by the mentioned majority is binding to dissenting minorities of creditors. If the plan is not approved, an order for the liquidation of the debtor shall be issued by the judge. Exception shall be taken of corporations and limited partnerships, which are governed by art. 48, LCQ. When the plan offered by the debtor during the "exclusivity period" is not approved, the mentioned article 48 provides for the enterprise salvaging ("*salvataje*", also known as "Argentine cram down"), entitling creditors and third parties to purchase the debtor's

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<sup>7</sup> These rules were non-existent in the original version of the Insolvency Law 24.522.

shareholding or other title to equity in the company if and when they reach an agreement to pay creditors already allowed into the reorganization proceeding. The result of the proceeding, if successful and completed, will be a change in the ownership of the company. According to the new version of article 52 of the Insolvency Law 24.522, after its amendment by the Law 25.589, the judge is empowered to approve a reorganization plan even when it is not approved by one or more classes, where certain conditions are met<sup>8</sup>.

17. The main consequence of the approved plan is that all obligations existent before the opening of the reorganization proceeding shall be novated ("*novación*"). The main significance of this rule is that the amounts of the debt will be reduced to all effects, including the case of liquidation on default of the terms of the plan. Where approval of the plan has been procured by fraud, within six months after its judicial approval the plan is subject to challenge at the request of any creditor encompassed by the clauses of the plan. If the fraud is proved, the plan shall be nullified and the debtor shall be liquidated. If the terms of the plan are not accomplished, the judge shall order the liquidation of the debtor.

18. A creditors' committee ("*comités de acreedores*") serves as an information and counsel body in a reorganization, which ensures that the debtor meets the payments proposed in the confirmed reorganization plan, and other aspects of the plan. In liquidation, the committee supervises the realization of the assets. As a general rule, the relative priorities of creditors are ruled solely by the bankruptcy law. The rank of credits in Argentine bankruptcy proceedings is as follows: (1) The "especially privileged credits" ("*créditos con privilegio especial*"); (2) The "administrative expenses" ("*gastos de conservación y de justicia*"); (3) The "ordinarily privileged credits regarding labor" ("*créditos con privilegio general laboral*"); (4) The rest of not labor "ordinarily privileged credits" ("*créditos con privilegio general, no laboral*"); (5) The "ordinary, common or unsecured credits" ("*créditos quirografarios o comunes*"); (6) The "conventionally subordinated credits" ("*créditos subordinados*"); (7) The "foreign credits payable after all others have been settled" or "foreign credits legally subordinated" ("*créditos extranjeros postergados al saldo*"); (8) The "holders of equity", ("*socios*") of the bankrupt company. If after the satisfaction of all the prior classes there is surplus, it has to be delivered to the debtor. As in case of bankruptcy liquidation the company ceases to exist, the remaining money shall be distributed among the partners or the shareholders.

### C. REGULATORY FRAMEWORK FOR INSOLVENCY

#### Institutional Framework and Capacity

19. **The regulatory framework for insolvency proceedings is broadly complete, although a number of inefficiencies are reported to exist.** Jurisdiction of insolvency matters is established by LCQ to the judge with ordinary jurisdiction ("*juez con competencia ordinaria*"). This entirely rules out the jurisdiction of Federal judges on the matter. Jurisdiction is exclusively of Provincial judges and that has always been the rule. The judge has significant roles in liquidation proceedings. Both in liquidation and reorganization proceedings, the judge is the "director" of the process ("*El juez tiene la dirección del proceso ...*"). As directors of insolvency

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<sup>8</sup> All these conditions must be met: (i) The plan is approved by at least one class of unsecured creditors; (ii) There are favorable votes of at least 75% of the total amount of unsecured claims; (iii) The plan does not discriminate against the dissenting class or classes; and, (iv) The payment granted to all creditors encompassed by the plan is not less than the amount they would receive in liquidation.

proceedings (LCQ, 274), Argentine bankruptcy judges are entitled to use their power in order to investigate and deal with fraud, illegal activities and abuse of the bankruptcy system.

20. **Many provinces established judicial councils (*Consejos de la Magistratura*) for purposes of judicial selection, budgetary matters, disciplinary issues and other related aspects.** Commercial judges sitting in the national capital, Buenos Aires, are also subject to a selection process performed by the Federal Judicial Council (*Consejo Federal de la Magistratura*). As for training and continuing education for judges, many jurisdictions have a judicial school or an institution for building capacity of judges and court staff (*Escuela Judicial, Centro de Capacitación Judicial*). In recent years some universities established graduate programs for lawyers who want to compete for judicial positions.

21. **Argentine insolvency law does not mention the possibility of consensual resolution among parties.** The Argentine courts issue written decisions with reasons, which provides scope for public scrutiny of judicial performance. Except in some exceptional situations, precedents are not binding for future cases. Conflicts of interest rules for judges are established in Codes of Civil and Commercial Procedure. There are ethical codes of behavior for judges only in a few provinces, while others are considering its implementation.

#### **Regulatory Framework for Insolvency**

22. **Under Argentine bankruptcy law, courts of appeals perform the role of regulatory and supervisory bodies of the “*síndicos*” and other insolvency functionaries like evaluators, co-administrators and auctioneers (*estimadores, coadministradores, enajenadores*).** Professional bodies do not have a specific statutory, regulatory or supervisory function relative to the insolvency system and those who administer cases within it. However, accountant professional bodies (*Consejos Profesionales de Ciencias Económicas*) have recognized the increasing importance and complexity of insolvency and have established ethical standards, best practice guidance and continuing professional education for members specializing in insolvency.

23. **The process for qualifying and supervising performance and conduct of “*síndicos*” remains weak and does not assure maximum integrity in the system.** Throughout liquidation and reorganization proceedings the role of the “*síndico*” is permanent. The “*síndico*” is appointed by the court from a list of independent accountants. The “*síndico*” may require professional advisement in legal matter appointing a lawyer. Only accountants may be “*síndicos*”, after accomplishing several prerequisites provided by the law. Therefore, “*síndicos*” are private professionals who enroll in lists from which they may be appointed. Acceptance of accountants to be included in the lists must undergo several requirements, and their professional background is taken into consideration. Every four years, Courts of Appeals make the lists of “*síndicos*”, and therefore supervise their performance and behavior. Candidates may be both, individual accountants or Accountant Firms. The latter shall be appointed when the importance and complexity of the proceeding so demands.

#### **D. CREDIT RISK MANAGEMENT/INFORMAL CORPORATE WORKOUTS**

24. **No formal framework for corporate workouts exists and these are not widely used in practice due to the lack of appropriate incentives.** The LCQ provides for the judicial cognizance of an out-of-court obtained general settlement of a debtor with his creditors (“*acuerdo preventivo extrajudicial*”). The remedy is available both to debtors who have reached insolvency as well as to those who are in still a pre-insolvency situation of general economic

and/or financial distress ("*dificultades económicas o financieras de carácter general*"). An out-of-court settlement is ruled under Contract Law and may contain whatever provisions the debtor and the participating creditors have found to be convenient. After the recent amendments introduced to the Insolvency Law 24.522 by the Law 25.589, an out-of-court settlement, having been judicially confirmed shall have the same effects of a restructuring plan obtained in a formal judicial reorganization proceeding. As such, it shall also bind the dissenting minorities. To obtain confirmation, an out-of-court settlement shall be signed by creditors that amount to a majority in number and two-thirds of the total unsecured debt. Nonetheless, it is binding on all signatories whatever the outset of the judicial confirmation procedure, if the parties have not provided it for otherwise.

**25. The lack of appropriate incentives (provisioning rules, tax incentives) for both the debtor and the creditors, as well as other factors such as the advantages for the debtor of some effects of formal reorganization proceedings (automatic stay, suspension of calculation of interests, majority agreements binding dissenting minorities, etceteras), explain the scant use of workout techniques until now. The modifications introduced by the Law 25.589 –notably, the stay of proceedings as a result of the filing for the judicial confirmation of the out-of-court settlement and its binding force over dissenting minorities when said agreement is judicially confirmed—are significant advances to obtain prepackaged restructuring plans and have the potential to increase its use in the near future, especially if a new legal framework for workouts is appropriately developed.**

### **III. SUMMARY OF ASSESSMENT FINDINGS AND CONCLUSIONS**

**26. The legal framework for enforcement of both secured and unsecured rights is largely consistent with the Principles.** Priority should be placed on the following:

- Unsecured creditors encounter difficulties in individual executive proceedings (*procesos individuales de ejecución*): (i) in practice, methods for obtaining judgments are not really summary because the debtor is entitled to propose several appeals and defenses to dispute the debt. As a consequence, enforcement procedures are lengthy and inefficient; (ii) filing an enforcement action is costly in most jurisdictions, specially in provinces where tax authorities levy “justice taxes” (*tasas de justicia*). As the enforcement system is not efficient, many creditors consider more attractive filing involuntary insolvency proceedings (the majority of bankruptcy petitions is filed by creditors and not by the debtor). Actually, an inefficient enforcement system is interacting in a counterproductive manner with the insolvency system.
- Laws applicable to pledges are somewhat outdated for securities on intangible property.
- Recording and registration of mortgages is expensive, especially in jurisdictions where the local (provincial) authorities levy stamp taxes.
- The absence of a single national Land Office Registry, as well the plurality of Public Commercial Registries, make the access to information difficult and costly.

**27. Argentine corporate insolvency regime is largely consistent with the Principles and is reasonably integrated with the country’s broader legal and commercial systems, with the following areas of improvement needed:**

- The judge is not empowered to convert rehabilitation proceedings into liquidation where there is conclusive evidence that the debtor is not a viable enterprise. In consumer insolvency proceedings, there are many reported cases of abusive utilization of the conversion of voluntary liquidation into reorganization with the purpose and effect of merely postponing the realization of the assets.
- Several inconsistencies exist among different laws ruling director and officer liabilities. Moreover, in practice liabilities are not effectively enforced in most insolvency cases. Among other factors, this situation may be attributed to: (a) the mentioned legal inconsistencies; (b) the existence of repeated systemic crisis in the last 30 years; (c) the lack of proper legal information of the “*síndicos*” who are reluctant to promote liabilities actions, thus confirming a lax culture about personal liabilities in insolvency; and, (d) the inefficiency of the judiciary in order to implement or to enforce insolvency liabilities, notably the criminal ones.
- Requirements for commencing a reorganization process are rather formalistic, excessively strict, and may impede or frustrate attempts for reorganization in many cases.
- In reorganization proceedings, the duration of the stay on secured creditors may be considered somewhat short in order to permit an appropriate development of the negotiation phase of the process.
- Creditors rarely accept being appointed members of the Committees because they fear incurring severe and unidentified personal liabilities.
- The law provides that all sales that are made in liquidation proceedings shall be finalized within the term of four months after the date of the order opening the liquidation case. This term is unrealistic and never actually accomplished. The length of the liquidation period depends on what types of assets exist and the difficulty in selling them. Simple cases usually take one year while most complicated cases might take several years. There is a general opinion of non-conformity about the duration of liquidation and also about the poor rates of distribution to common creditors.
- A relevant project (cleared by the International Swaps and Derivatives Association) to amend the bankruptcy law on the treatment of derivative transactions, swap agreements and option contracts has been approved by the Senate but still needs to be approved by the Chamber of Deputies and promulgated by the Executive.
- Argentine law does not provide for a commercially sound form of priority funding for the ongoing and urgent business needs of the debtor under *concurso preventivo*. In practice, enterprises in reorganization proceedings have difficulty in obtaining credit, although creditors who supply goods or services (or even loans) after the filing are not affected by the *concurso preventivo*.
- In circumstances where a secured creditor’s claim exceeds the value of its collateral, the law still treats that creditor as fully secured for voting purposes. Accordingly, unlike the claims of unsecured creditors (whose debt can be restructured through a qualified majority vote), the approval of each of these secured creditors is required for a

restructuring of even the unsecured portion of their claim. This discriminates against fully unsecured creditors.

- Argentine insolvency law does not establish any significant criteria for plan approval based on fairness to similar creditors and recognition of relative priorities and there are no legal provisions for possible adjournment of a plan.
- The treatment of foreign creditors as well as the legal framework for cross-border insolvencies is clearly non-consistent with Argentina's current needs and with generally recognized best practices. Argentine legal rules for cross-border insolvencies are outdated and do not provide for effective regulation to deal with cases of a cross-border nature. The main and most common cross-border insolvency problems do not have legal response under the current insolvency system.

28. **The legal framework for informal workouts is rarely used in practice.** The lack of appropriate incentives (provisioning rules, tax incentives) for both the debtor and the creditors, as well as other factors such as the advantages for the debtor of some effects of formal reorganization proceedings (automatic stay, suspension of calculation of interests, majority agreements binding dissenting minorities, et cetera), explain the scant use of workout techniques until now. The modifications introduced by the Law 25.589 –notably, the stay of proceedings as a result of the filing for the judicial confirmation of the out-of-court settlement and its binding force over dissenting minorities when said agreement is judicially confirmed—are significant advances to obtain prepackaged restructuring plans and have the potential to increase its use in the near future, especially if a new legal framework for workouts is appropriately developed.

29. **Insolvency courts are overburden in most jurisdictions.** Four and a half years of economic recession brought about a significant augment of enterprise insolvencies. This situation and a steady increasing number of consumer bankruptcy cases since the 80's when a unified insolvency regime (almost identical both for consumers and enterprises) came into force, caused that insolvency courts are overburden in most jurisdictions:

- Courts in large commercial centers have significant backlog of insolvency cases and the actual duration of these goes far beyond the terms established by the law. In reorganization proceedings, however, specialized bankruptcy courts of Mendoza meet the legal terms set forth by the LCQ. The general perception both in Córdoba and Mendoza is that specialization of judges has significantly improved their efficiency in insolvency cases.
- The composition and mission of the judicial councils (*Consejos de la Magistratura*), as well as the results obtained, vary greatly among the different jurisdictions. In many cases, the process of selection of judges exhibit a number of flaws(e.g., the composition of judicial councils and the non-binding character of their recommendations; the debates within the councils are not open to public; the political influence in favor of certain candidates exercised by some of the council members; and the lack of clear and objective rules for evaluation and examination of candidates).
- Courts competence, performances and services are not measured according to standardized rules. As a general rule, precedents are not binding for future cases. This is the rule in most Civil Law systems but frequently it causes inconsistent application of the

law. In insolvency cases, Argentine judges are usually reluctant to resort to consensual resolution techniques among parties.

- In some Argentine provincial jurisdictions, users of the system report complaints about undue political influence on judges as well as some corruption issues.
- Informed observers also complain about the lack of objectivity, legal information and requisite expertise of “*síndicos*” to manage complex restructurings. Many creditors also complain that in reorganization cases “*síndicos*” often act in collusion with the debtor.

#### IV. POLICY RECOMMENDATIONS

##### Recommended plan of action.

##### 30. Recommendations for immediate steps:

- **Adoption of a new legal mechanism at the earliest possible time instituting a consensual out-of-court corporate workout framework**, and which is adopted by Presidential Decree (*Decreto de necesidad y urgencia, o Decreto por delegación de poderes*), or by a Law if this could be passed by the Congress within the mentioned term. The new legal mechanism for workouts shall only apply to corporate insolvency cases and neither to consumers nor to any other individual insolvent person.
- **This new legal mechanism should also (and solely) establish the most urgently needed reforms to the insolvency system that are essential and feasible to introduce by a Decree (or by a Law if this could be passed by the Congress within the mentioned term), leaving other important but not so urgent amendments to a next stage of the reform process.**
- **As for the Fundamental Components of a Functional Workout Environment, see Annex II.**

**In addition, some of the components of the immediate mechanism should include the following:**

- Accelerate timetables for resolution so that debtors cannot shield themselves from their creditors for extended periods of time.
- Revise tax laws and regulations, banking regulations (specially classification of debtors and provisioning rules), securities and other related legislation in order to remove impediments to corporate restructuring and to create adequate and strong incentives to workouts mechanisms.
- Adopt expedited and simplified claims verification procedures for all insolvency law proceedings.
- In reorganization proceedings, authorize the bankruptcy judge to lengthen the stay on secured creditors, case by case and up to the maximum period of six months.

- Empower the judge to convert rehabilitation proceedings into liquidation where there is conclusive evidence that the debtor is not a viable enterprise.
- Encourage the effective functioning of the committees of creditors, by (a) Clarifying the liabilities of persons appointed members to these bodies; (b) Empowering creditors to dismiss the “*síndico*” without cause after the commencement of the proceedings; and, (c) Requiring that fees of creditors’ committees shall be paid by the debtor in reorganization proceedings and from the bankrupt estate in liquidation cases.
- Establish mandatory legal advisement for the “*síndico*”, implemented through appointment by the “*síndico*” of a lawyer to act jointly with the former in all stages of insolvency proceedings (*patrocinio letrado obligatorio*). The fees of the *síndico*’s lawyer should be treated as administrative expenses (*gastos de administración y de justicia*), and paid by the debtor in reorganizations and from the bankrupt estate in liquidations.
- Limit judicial fees in cases with significant amount of assets and / or liabilities. To that purpose, the amendment already introduced by article 14 of Law 25.563 to article 266 of Law 24.522 is a first step that should be followed by more detailed fee scales to be introduced as amendments to articles 265-272 of LCQ.
- Provinces with large commercial centers as well as the City of Buenos Aires should consider the benefits of adopting specialized bankruptcy courts. Creating new courts will certainly encounter budgetary difficulties impossible to overcome at this time and, in addition, a long process for the selection of new judges by the Judicial Council (*Consejo de la Magistratura*). A quicker solution would be to divide the competence of the current commercial judges, assigning future corporate bankruptcy cases to some of these judges (who would serve as specialized bankruptcy judges) and the rest of the commercial cases to the others. One solution to be considered for addressing the budgetary constraints would be to adopt a national approach that would bring corporate bankruptcies under the federal courts, while leaving consumer cases under the provincial courts.
- Enact the UNCITRAL Model Law on Cross-Border Insolvency.
- Implement and put into operation the National Registry for Insolvency proceedings (“*Registro Nacional de Concursos y Quiebras*”: articles 295-296 of the Law 24.522).

### **Recommendations for medium term focus:**

#### **31. Amendments to the legal and institutional framework for creditor rights:**

- Expedite judicial mechanisms for enforcing unsecured credit. These should be swift and inexpensive. In addition, enforcement methods should include summary mechanisms for obtaining judgments, where there is no real and substantial dispute about the debt (*procesos monitorios*), as well as a swift hearing process to return the goods if appropriate.
- Establishment of judges with exclusive competence on executions (*jueces o juzgados de ejecuciones individuales*) in cities that are large commercial centers.

- Urge the consideration by the Congress of the project of law for securities on movable assets (*Proyecto de ley sobre garantías mobiliarias*).
- Create an inexpensive, efficient and centralized information system, for all kind of local registries (*Registros de la Propiedad Inmueble* and *Registros Públicos de Comercio*).

32. **Adopt further amendments to the insolvency regime, considering these features:**

- Separate legal regimes for insolvent consumers (*personas físicas*) and for corporate insolvencies (*personas jurídicas*). The insolvency regime for consumers should: (a) Contemplate simple procedures with abbreviated terms; (b) Clarify the relationship of bankruptcy rules with rules of Family law (community property, alimonies, household exemptions, inheritance issues, etceteras); (c) Define the composition of the bankrupt estate and property exemptions; (d) Clearly rule the description and scope of discharge and relevant exceptions to this effect; (e) Eliminate the legal possibility of converting a voluntary liquidation into a reorganization proceeding.
- Simplify the legal regime for director and officer insolvency liabilities and harmonize it throughout the different laws that rule these issues, notably the insolvency law and the corporation law (*Ley de quiebras* y *Ley de sociedades comerciales*).
- Allow debtors to have easy access to reorganization proceedings, avoiding formalistic, expensive and excessively strict provisions for commencing the process by: (a) The elimination of the accountant's attestation established in article 11 inc. 3 and inc. 5 of LCQ; (b) An amendment to the law, ordering the judge to open the reorganization proceeding when the debtor largely fulfills the formal prerequisites of LCQ (article 11) and even where he does not fully accomplish with all the mentioned prerequisites.
- Accelerate the enactment of the already approved by the Senate bill for reform of the bankruptcy law on the treatment in liquidation and reorganization proceedings of swap agreements and derivatives transactions.
- Create a priority for the repayment of money lend to the business after the commencement of reorganization proceedings.
- Provide for the valuation of the security of creditor upon the commencement of the proceedings. This could be done during the claims-verification procedure. Secured creditors would then be permitted to vote as unsecured creditors to the extent that the value of their claim exceeds the value of the collateral.
- Establish clear criteria for plan approval based on fairness to similar creditors, recognition of relative priorities and majority acceptance. Some provision for possible adjournment of a plan decision meeting should be made, allowing the creditors to vote posterior amendments to the plan when these modifications are in their own interest.
- Clear criteria and minimum standards for the qualifications and selection of judges, for the processing of judicial appointment and for governing judicial conduct. Judges must be selected free of political influence and partisanship, patronage and conflicts of interest as well as localism. Personal qualifications and experience should prevail over political

considerations. A good knowledge of commercial practice and basic principles of business and finance, as well as specific knowledge of insolvency legislation, are desirable minimum standards.

- Reinforce the quality and skills of judges, newly appointed or existing, by continuing training. Judicial schools should develop programs focused on practical matters and taught with less theoretical teaching methods. These schools should provide training to both judges and court staff. Training should include basic and more sophisticated insolvency concepts and techniques, related commercial law subjects, and accounting and finance concepts and techniques that are important in insolvency. Training should also focus on techniques for conducting research, court administration and case management. Emphasis should also be placed on training judges as trainers.
- Supplement the insolvency law by sensible, predictable and flexible rules and regulations to better manage cases and streamline procedures.
- Control and management of the court's budget, internal finances, personnel, facilities and administration and technical support systems should be vested within the court system to the extent possible or be regulated with substantial input from the court system.
- Encourage the use of alternative techniques such as arbitration or mediation to resolve disputes to the extent it is possible in insolvency proceedings.
- Establish remedies to address improprieties, including complaint and investigation procedures. Written standards, guidelines, advisory opinions, complaint and investigation procedures, and tools to redress impropriety should all be vested in an independent and respected judicial or ancillary authority. Ethical standards should be developed and ethics should be a priority in judicial training. An ethics code should be developed with the participation of judges. In addition, a public complaint process should be established. A committee of senior judges should be set up to advise their colleagues on ethical issues.
- Improve the legal framework and / or the institutional resources in order to overcome the problem of the current ineffective supervision of the "*síndicos*" by the Courts of Appeals. To this end, one possible alternative would be to provide the Courts with better economic and human resources to deal with the supervisory role of the "*síndicos*". Another alternative is to consider the feasibility and advantages of a completely new regulatory and supervisory body for insolvency administrators.
- Establish an insolvency qualification exam and continuing education requirements for "*síndicos*".