INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 4A - Guidance Text

Argentina

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CONTENTS

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IN INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN ARGENTINA

Welcome to **Module 4A**, dealing with international insolvency law in **Argentina**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of insolvency law in Argentina;
- a relatively detailed overview of Argentina's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Argentina.

This guidance text is all that is required to be consulted for the completion of the formal assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2024**. Please consult the Foundation Certificate in International Insolvency Law web pages for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2024 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Argentina:

- the background and historical development of insolvency law in Argentina;
- the various pieces of primary and secondary legislation governing Argentinian insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in Argentina;
- the rules relating to the recognition of foreign judgments in Argentina.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Argentinian insolvency law; and
- be able to answer questions based on a set of facts relating to Argentinian insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through the text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO ARGENTINA[1]

Located at the extreme south-east of the South American continent, Argentina is the eighth largest country in the world and the second largest in Latin America. Argentina is a part of the Southern Cone together with Chile, Uruguay, Paraguay and southern Brazil.

The country is 3,694 km long from north to south and 1,423 km wide from east to west, with a total area of 3,761,274 km². Argentina is one of the forty most populated countries in the world, with a total population of approximately 45 million people.

Argentina is considered an "immigration country" due to the massive immigration inflows that it received over time from Europe mostly, which resulted in a cosmopolitan population with a good level of education and with technical specialisation.

3.1 Economy

As a developing economy, Argentina has the advantage of the size of its territorial area and its natural capital assets. Its extraordinary fertile land makes Argentina one of the largest agricultural producers in the world – it is one of the major countries worldwide in soybean production and also a dominant producer of oleaginous products, corn and meat. The beef and soy sectors apply some of the most modern practices in the world and are leaders in breeding, agricultural machinery, and innovation. Argentina has vast natural resources in energy, with world-class wind and solar potential, and the second-highest shale gas and fourth highest shale oil reserves in the world. In addition, Argentina has significant opportunities in some manufacturing subsectors and high-tech, innovative services.

Argentina is part of the regional entity Southern Common Market (also known as *Mercosur*), which also comprises Brazil, Paraguay and Uruguay as members.

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[1] For further information on the subject see The World Bank paper entitled "*Argentina: Escaping Crises, Sustaining Growth, Sharing Prosperity*" available at https://documents.worldbank.org/en/publication/documentsreports/documentdetail/696121537806645724/argentina-escaping-crises-sustaining-growth-sharing-prosperity.

Argentina has a historically large and strong middle class. Social indicators are mostly good, and society deeply values education and knowledge as a means for potential mobility and improving status. Four of the six most successful Latin American tech unicorn companies (each with a value of over USD1 billion) are Argentinian, and these successes in research and innovation makes the country a potential destination for high-value-added industries.

Nonetheless, compared to that of its peers, Argentina's long-run economic performance has been disappointing, affecting the country's ability to reduce poverty and increase incomes of its citizens. The main explanation for this poor performance is Argentina's unusually volatile macroeconomic environment. During the period 1950 to 2016, Argentina went through 14 recessions (one or more consecutive years of negative growth), with an average duration of 1.6 years. As a result, the country spent roughly one-third of the time since 1950 in recession.

3.2. Legal framework

Argentina´s legal tradition and rules stem from the civil or Roman law systems, which means that the core principles of its law are codified into a referable system which serves as the primary source of the law, and that judgments are not binding precedents for future cases (the *stare decisis* rule is thus not applicable).[2]

The National Constitution of Argentina of 1853 (the fundamental law of the Argentinian legal system) provided for a representative, republican and federal system of government, which has been maintained through all the constitutional amendments since then (the latest thereof being in August 1994). The current National Constitution results from the text enacted by the Constituent Convention of 1994.

As mentioned above, Argentina has adopted a federal system of government. Accordingly, its government system is based upon division of powers between the federal government and local governments (that is, the provinces and the Autonomous City of Buenos Aires), where the latter retain all the powers not delegated to the federal government by the National Constitution.[3]

Thus, under the federal system adopted by the Argentine Republic there are two types of government: (i) a federal or national sovereign government, with jurisdiction in the entire territory of Argentina, and (ii) the local governments (provinces and the Autonomous City of Buenos Aires), with separate authority to provide their own institutions and local constitutions, and with jurisdiction exclusively in their own territorial areas. Therefore, each province enacts its own constitution, elects its own governor and legislators, and appoints its own judges to the provincial courts.

Argentina is divided into 23 provinces and the Autonomous City of Buenos Aires, the seat of the federal government. Its governmental organisation consists of three branches: executive, legislative and judicial.

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[2] However, in Argentina, judicial precedents are the most valuable method for interpretation, and legal forecasts are usually based on them.

[3] Cf National Constitution, art 121.

The executive branch of the federal government is exercised by the President of Argentina, elected for a term of four years. The President has broad powers, including the power to approve or veto decisions by the National Congress (the legislative branch). The executive branch of each province is exercised by a governor, and the governor's term of office, the manner of election and the right to be re-elected are determined by each provincial constitution (which generally determines a term of four years).

The legislative branch is the National Congress, consisting of two houses. The House of Representatives is composed of members elected by direct voting that represent the interests of Argentine People; and a Senate, composed of members elected by direct voting that represent the interest of each province and the Autonomous City of Buenos Aires. In turn, each of the 23 provinces and the Autonomous City of Buenos Aires has a provincial legislative branch, exercised by the relevant provincial legislature, which consists of one or two houses as established by each provincial constitution.

The judicial branch consists of two parts, being federal and provincial (which relate to each of the 23 provinces, pursuant to the National Constitution).

The federal judiciary (sitting in different jurisdictions within Argentina) has jurisdiction in federal matters occurring in their respective jurisdictions. Federal courts in the Autonomous City of Buenos Aires are divided into Courts of Appeals and lower courts for each subject matter (for example commercial, labour, civil and criminal law). In the other jurisdictions, federal courts have jurisdiction over all federal matters.

In turn, the provincial judiciary is in the hands of each province. Based upon the separate jurisdiction acknowledged by the National Constitution, they organise and administer ordinary justice within each territory. Most provincial judiciaries are divided into lower courts, Courts of Appeals and a Supreme Court for each province.

The highest judicial authority in Argentina is exercised by the National Supreme Court of Justice. It is the final legal authority for matters in which it has original jurisdiction (matters concerning foreign ambassadors, ministers and consuls, and also litigation between provinces), and in matters of appellate review in (i) cases of unconstitutionality, (ii) terms of a special federal appeal where the case requires a decision between two statutes of equal or different rank, or (iii) respect of an international treaty.

The National Constitution entitles the National Congress to enact codes concerning civil, commercial, criminal, mining, labour and social security matters, which codes applicable throughout the country. The Civil and Commercial Code, the Companies Law and the Bankruptcy Law therefore apply in all matters.

The judicial procedure, however, is governed by the federal or provincial procedural law that applies to each jurisdiction. It must be noted that federal and provincial procedural laws differ.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

Following the enactment of the National Constitution in 1853, insolvency proceedings were originally governed by the Commercial Code of 1862 (later amended in 1889) which was successively replaced by Law 4156 (valid from 1902 to 1933), Law 11.719 (valid from 1933 to 1972) and Law 19551 (valid from 1972 to 1995 with a partial amendment in 1983 by Law 22.917). On 20 July 1995 Law 19551 was replaced by the Argentine Bankruptcy Law 24.522 (Bankruptcy Law or ABL), which governs insolvency proceedings at present.

As one of the emergency measures adopted to help stabilise the corporate sector during the 2002 economic and institutional crisis, the Bankruptcy Law was amended in February 2002 by Law 25.563, imposing a six-month automatic injunction against creditor actions to recover debt. Creditor rights and insolvency mechanisms were dealt a significant blow by Law 25.563. A significant advance to restore a level playing field for debtor-creditor relationships was obtained with the enactment of Law 25.589 on 16 May 2002. This law repealed most of the emergency measures of Law 25.563 and reinstated relevant provisions of the Bankruptcy Law that had been derogated or that were under suspension.

Law 24.522 was also partially amended by Law 26.086 enacted on 11 April 2006, Law 26.684 enacted on 30 June 2011, and Law 27.710 enacted on 8 September 2015.

During the time period 1862 to 1972, Argentine bankruptcy legislation only regulated insolvency proceedings concerning a businessman[4] and corporations. On the contrary, insolvency situations regarding either natural persons (individuals) or non-profit entities were governed by the provincial procedural laws under an institution called *concurso civil*. It was not until enactment of Law 19.551 that insolvency proceedings of both individuals or non-profit organisations, and a businessman and corporations were unified under identical rules. Law 24.522 has kept that methodology.

The Bankruptcy Law is also applied to government owned corporations and other state companies.

The liquidation of insolvent banks and financial institutions, insurance companies and sporting clubs are provided for respectively by *Ley de Entidades Financieras* 21.526 as of 14 February 1997 (and its amendments); *Ley de Ejercicio de la Actividad Aseguradora* 20.091 as of 7 February 1973; and the *Ley de Régimen Especial de Administración de las Entidades Deportivas con Dificultades Económicas* 25.284 as of 25 July 2000. All of the aforementioned statutes establish significant modifications to the Bankruptcy Law.

Neither insolvent banks nor insolvent insurance companies are entitled to file for reorganisation proceedings.

[4] "Businessman" refers to an individual who runs a business, equatable to a merchant or trading natural person.

Trusts are excluded from the regime established by the Bankruptcy Law although, in accordance with the new Civil and Commercial Code, some of its rules may apply to the liquidation of a trust.

The following are the main characteristics of, and important factors pertaining to, the imperative legal system set forth by Law 24.522 (and its partial amendments):[5]

(1) Preservation of structure: despite the introduction of new and important changes including modifications in the "spirit" of certain statutory solutions to problems posed by insolvent entities, Law 24.522 deliberately maintained substantially the same text as Law 19.551 in the majority of its chapters. The preservation of structure and text was meant to keep in force most of the important doctrine and jurisprudence that had been developed under Law 19.551.

(2) Abandonment of the Project Proposing to Adopt Foreign Legislation: Prior to the enactment of Law 24.522, a proposal was circulated to adopt, in general terms, the bankruptcy law of the United States. This proposal ultimately failed, as the authors of Law 24.522 authors (Julio C Rivera and Daniel R Vítolo) considered US Bankruptcy Law to reflect a variety of cultural and sociological conditions that were not present in Argentina. Therefore, some of the restructuring proceedings provisions are somehow comparable to the reorganisation provisions in Chapter 11 of the United States Bankruptcy Code (only those adapted to Argentine law traditions).[6]

(3) The impact of Argentina's unusually volatile macroeconomic environment: reflected in large swings in economic activity has played a central role in shaping the policy-making process of its insolvency laws and its subsequent amendments.

(4) The Argentine insolvency framework withing the civil law system: it is reasonably integrated with the country's broader legal and commercial codes and laws that complement it.

[5] For further insight into the subject see: Report on the Observance of Standards and Codes (ROSC) Argentina, Insolvency and Creditor Rights Systems, prepared by a World Bank team based on information provided by the Argentinian authorities available at https://documents.worldbank.org/en/publication/documents-reports/documentdetail/976221468002648654/argentina-report-on-the-observance-of-standards-and-codes-rosc-insolvency-and-creditor-rights-systems; and Insolvency, Reorganization and Bankruptcy Law in Argentina: An Overview available at https://www.kierjoffe.com/news/lawyer-argentina-attorney-buenos-aires-law-firm/insolvency-reorganization-and-bankruptcy-law-in-argentina-an-overview/.

[6] Such as provisions that rule out-of-court restructurings (similar to the pre-packaged agreements) or the cramdown power.

4.2 Institutional framework

4.2.1 Regulatory framework for insolvency[7]

Jurisdiction of insolvency matters vests in the judge with ordinary jurisdiction.[8] This provision entirely rules out the jurisdiction of federal judges on insolvency matters, and jurisdiction is exclusive to provincial judges.

In Argentina, there are only specialised courts in a few jurisdictions (that is, Córdoba and Mendoza). Commercial courts in the Autonomous City of Buenos Aires, although not specialised, are competent to hear insolvency matters, even though they also hear many other unrelated matters such as individual execution proceedings or the application of consumer laws. The remainder of the courts in the country deal with reorganisation and bankruptcy proceedings along with any other commercial or civil matters.

The judge plays a significant role in liquidation proceedings. Both in liquidation and reorganisation proceedings, the judge is the "director" of the process. As directors of insolvency proceedings,[9] 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.

Many provinces established judicial councils for purposes of judicial selection, budgetary matters, disciplinary issues and other related aspects. Commercial judges sitting in the Autonomous City of Buenos Aires are also subject to a selection process performed by the Federal Judicial Council. As to the training and continuing education of judges, many jurisdictions have a judicial school or an institution for building capacity of judges and court staff.

Throughout liquidation and reorganisation proceedings the role of the trustee (*síndico*) is also fundamental and permanent. The trustee is appointed by the court from a list of independent accountants. The *síndico* may require professional advisement in legal matters and appoint a lawyer. Only accountants may be trustees, after accomplishing several prerequisites provided by the law. Therefore, *síndicos* are private professionals who apply to be placed on a list from which they may be appointed. In order for an accountant to be accepted and placed on the list several requirements must be met, and their professional background is taken into consideration. Every four years, Courts of Appeals compile two lists of *síndicos*, and therefore supervise the performance and behaviour of *síndicos*. One list consists of individual accountants and the other of accounting firms. The latter shall be appointed when the importance and complexity of the proceeding so demands.[10]

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7 For further insight into the subject see: Report on the Observance of Standards and Codes (ROSC) Argentina, Insolvency and Creditor Rights Systems, prepared by a World Bank team based on information provided by the Argentinian authorities available at see https://documents.worldbank.org/en/publication/documentsreports/documentdetail/976221468002648654/argentina-report-on-the-observance-of-standards-and-codes-rosc-insolvency-and-creditor-rights-systems.

8 ABL, art 3.

9 *Idem*, art 274.

10 *Idem*, art 253.

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. 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, accounting professional bodies have recognised the increasing importance and complexity of insolvency and have established ethical standards, best practice guidance and continuing professional education for members specialising in insolvency.

The regulatory framework for insolvency proceedings is generally comprehensive, although a number of inefficiencies are reported to exist, such as:

- a lack of insolvency specialisation among judges that impedes efficiency and uniformity across the country;

- recurrent economic recessions and a steady increasing number of consumer bankruptcy cases has caused insolvency courts to be overburdened in most jurisdictions. As a consequence, courts in large commercial centers have a significant backlog of insolvency cases and the actual duration of cases extend far beyond the terms established by the law;

- the composition and mission of the judicial councils, as well as the results obtained, vary greatly among the different jurisdictions and in many cases the process of selecting judges exhibits a number of flaws. Some problems include for example, the debates within the councils are not open to the public; the political influence in favour of certain candidates exercised by some of the council members; and the lack of clear and objective rules for evaluation and examination of candidates;

- competence of the courts, its performances and services are not measured according to standardised rules. As a general rule, precedents are not binding for future cases. This is the rule in most civil or Roman law systems but frequently causes inconsistent application of the law;

- in insolvency cases, Argentine judges are usually reluctant to resort to consensual resolution techniques among parties; and

- the process for qualifying as *síndicos* and the process of supervising performance and conduct of *síndicos* remain weak and does not assure maximum integrity in the system. Many creditors also complain that in reorganisation cases trustees often act in collusion with the debtor.

4.2.2 Creditors' rights and enforcement procedures[11]

The Civil and Commercial Procedural Codes govern the enforcement of unsecured claims. There is a civil and commercial procedural code of national application, applicable to cases

[11] For further insight on this subject, see R W Beller, *Insolvency and Restructuring Proceedings in Argentina*, available at https://www.iiiglobal.org/sites/default/files/3-_060821Beller.PDF.

under the federal judiciary, and the civil and commercial courts of the Autonomous City of Buenos Aires. Civil and commercial procedural codes also exist for each of the 23 provinces. Nevertheless, the provisions regarding enforcement actions of unsecured rights are not significantly different throughout the 24 codes.

Unsecured claims fall into two categories for purposes of execution: those entitled by law to an executory process,[12] and those devoid of such rights.

The executory proceedings have a number of advantages for qualifying claims, including (at least in theory) access to expedited summary proceedings. Advantages to the claimant can be summarised as:

(a) a right to obtain attachment or garnishment orders on the debtor's assets without posting a bond;[13]

(b) a severe restriction on the availability of defences;

(c) the debtor bears the burden of proof on facts regarding redemption of the debt;

(d) the right of appeal is restricted; and

(e) the claimant can obtain immediate execution on a debtor's assets subject to a judgment under appeal if a sufficient bond is furnished.

Nonetheless, the final judgment rendered in an executory process is of a preliminary nature, as the debtor is able to introduce a further procedure wherein all defences not arguable under the restrictive executory process rules may be alleged.

Unsecured creditors however encounter the following difficulties in individual executive proceedings:

(a) in practice, methods for obtaining judgments are not really summary as the debtor is entitled to propose several appeals and defences to dispute the debt. As a consequence, enforcement procedures are lengthy and inefficient;

(b) filing an enforcement action is costly in most jurisdictions, especially in provinces where tax authorities levy "justice taxes"; and

(c) as the enforcement system is not efficient, many creditors consider it more attractive to file involuntary insolvency proceedings (the majority of bankruptcy petitions is filed by creditors

[12] For instance, a creditor who holds an enforceable document which grants the right to execute an obligation, such as cheques and promissory notes.

[13] While creditors devoid of such right must show a likelihood of irreparable harm unless the measure is granted (*periculum in mora*) and a substantial likelihood of success on the merits (*fumus boni juris*), and they must post a bond.

and not by the debtor). In actual fact, the inefficient enforcement system is interacting in a counterproductive manner with the insolvency system.

Creditors who are not entitled to execution are obliged to pursue recovery by a more protracted process of full cognisance (ordinary proceedings), wherein all defences and all evidence are made readily available to the debtor. As a consequence, this processes typically averages a longer timeframe, although procedures exist for accelerated decision-making, resolution, arbitration and mediation.

Self-Assessment Exercise 1

Question 1

Identify the idiosyncrasy of Argentine insolvency system by answering the following:

(a) To what legal tradition does Argentina pertain?

(b) Is the Argentine Bankruptcy Law a National Act or are there as many bankruptcy laws as there are states?

(c) Who has jurisdiction in insolvency matters and what law applies to the judicial procedure?

(d) Has Argentine Bankruptcy Law been amended?

Question 2

In which other procedures can creditors enforce their rights other than the insolvency proceedings?

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY[14]

5.1. Securities and priorities

Under Argentine law security interests may be obtained through mortgages, pledges (either registered or floating pledges), security assignments and trusts. Security may be taken over a wide range of property, such as movable and immovable property (*in rem*), securities, shares, cash and receivables.

5.1.1 Mortgages

A mortgage may be established over real estate, ships and aircraft. A mortgage will generally secure the principal amount, accrued interest, and other related expenses owed by a debtor to a creditor. The guarantee can be offered by the debtor or by any third party, and can be used to secure any kind of obligation.

To satisfy the "specialty or singularity" principle established by the Civil and Commercial Code, the secured obligation must be properly identified. The maximum principal of the secured obligation must be determined in monetary terms. Conditional, future or undetermined obligations can be secured, provided that a maximum amount of the guarantee is determined when the mortgage is created and that the term of the guarantee does not exceed 10 years.

Mortgaged property may remain in the mortgagors (that is, its owners) possession.

Mortgages over real estate may only be created by a notarial deed signed before a notary public. If a mortgage deed is not issued, the security is not created. The mortgage deed must then be filed for registration with the Public Real Estate Registry of the jurisdiction where the property is located. The mortgage is only effective *vis-à-vis* third parties once it is registered.

Mortgages over ships may be created by a notarial deed or an authenticated private instrument. The ship mortgage then must be filed for registration with the National Ship Registry to become effective vis-à-vis third parties. Under Argentine conflict-of-law rules, mortgages over ships are governed by the law of the ship's flag. In addition, Argentina will recognise mortgages established outside of Argentina to the extent that the foreign state recognises mortgages established in Argentina.

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[14] For further insight see: R W Beller, "Insolvency and Restructuring Proceedings in Argentina" available at https://www.iiiglobal.org/sites/default/files/3-_060821Beller.PDF; "Doing Business in Argentina" available at https://www.marval.com/Resources/Varios/9c6fd6aa-6044-461e-8cea-598b8c929bdc.pdf; J Rivera Jr "Restructuring and insolvency in Argentina: overview" available at https://content.next.westlaw.com/1-505-9725?lrTS=20210619120530857&transitionType=Default&contextData=(sc.Default)&firstPage=true and Report on the Observance of Standards and Codes (ROSC) Argentina, Insolvency and Creditor Rights Systems, prepared by a World Bank team based on information provided by the Argentinian authorities available at https://documents.worldbank.org/en/publication/documentsreports/documentdetail/976221468002648654/argentina-report-on-the-observance-of-standards-and-codes-rosc-insolvency-and-creditor-rights-systems.

Mortgages over aircraft may be created by a notarial deed or an authenticated private instrument. The mortgage then must be filed for registration with the National Aircraft Registry to be effective *vis-à-vis* third parties. Under Argentine conflict-of-law rules, liens over aircraft are governed by the law of the aircraft's flag. In addition, Argentina will recognise mortgages established outside Argentina to the extent that the foreign state recognises mortgages established in Argentina.

Mortgages grant the registered mortgagee a first priority right over the underlying asset. The holder of a first-degree mortgage over real property will be given priority over any other credits subsequently secured by a mortgage over the same property, bar a few exceptions. Priority is given based on the chronological order in which each mortgage is registered.

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 as the plurality of Public Commercial Registries, make the access to information difficult and costly. 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 Autonomous City of Buenos Aires.

Foreclosure of a mortgage is effected through a special summary proceeding which provides for the sale of the property through a public auction. Foreclosure may be conducted by out-of-court proceedings under certain conditions. Foreclosure of a mortgage is subject to special rules if the debtor is subject to a bankruptcy proceeding.

5.1.2 Pledges

5.1.2.1 Possessory pledge

As a general rule, to perfect a pledge over a non-registrable movable asset or document of credit, the pledged asset will be delivered to the creditor or placed in the custody of a third party. The Civil and Commercial Code states that a pledge must be executed through a public deed or a private agreement with evidence of the effective date of its execution. In case of failure to comply, the contract will not be enforceable against third parties. The "specialty or singularity" principle must be satisfied, as with mortgages.

The Civil and Commercial Code allows that, in the event of default on the secured debt, the creditor may sell the pledged asset through a court auction. In principle, the creditor may not obtain ownership of the asset. However, the creditor who has a pledge over an asset has a priority right to the proceeds from asset sale. Any surplus will be returned to the debtor.

Unless the debtor and creditor agree on a special sales proceeding, the pledged asset must be sold by public auction, and duly announced in the Official Gazette.

5.1.2.2 Non-possessory pledge (registered pledges)

The pledged asset remains in the debtor's possession and the creditor's interest is protected through registration of the right at the Registry of Non-possessory Pledges (Registry of Pledges). Both fixed and floating pledges are registered in this manner. Fixed pledges affect only the relevant registered assets, while floating pledges affect the original pledged goods and the goods derived from its transformation or replacement.

The amount of the pledge is limited to the amount of the secured obligation, including, without limitation, interest and other ancillary amounts.

Registered pledges do not require a public deed to be established. It may be established through an authenticated private instrument using forms provided by and filed with the Registry of Pledges. If no such private instrument is executed, the pledge is not created. Fixed pledges fall under the jurisdiction of the Registry of Pledges where the assets are located, and floating pledges fall under the jurisdiction of the Registry of Pledges where the debtor is domiciled. The pledge becomes effective *vis-à-vis* third parties only upon the above-mentioned filing.

Pledges of movable property are registered in a centralised national registry, called the National Pledges and Cars Registry. The National Pledges and Cars Registry has offices in all important cities in Argentina.

The relevant registry will issue a pledge certificate in favour of the creditor. If the debtor fails to repay the debt, the creditor can file the certificate at court to foreclose the pledged asset by special summary proceedings. Claims should be filed, at the option of the creditor, in the jurisdiction where payment was agreed upon; where the goods are located; or where the debtor is domiciled; except when the debtor is considered a consumer. In that case, it is mandatory to file the claim in the jurisdiction where the debtor is domiciled.

On enforcement of the pledge, the proceeds must firstly be applied to paying all taxes and expenses incurred to protect the assets, and secondly to pay the principal and interest of the debt secured by the pledge.

Foreclosure of a pledge is subject to special rules if the debtor is subject to a bankruptcy proceeding.

5.1.2.3 Pledges of shares

Pledges of shares are governed by the Civil and Commercial Code and the General Companies Law. Based on Argentine law, shares must be issued in non-endorsable registered form or book-entry form. Pledges over shares must be reported to the issuing company or the registrar (if any), and must be recorded in the company's or the registrar's books. The pledge only takes effect *vis-à-vis* the company that issued the shares and third parties from the date on which it is registered in the company's or registrar's books.

The pledge grants the creditor a priority right over the proceeds of the sale of the shares. For shares or other securities traded on stock markets, those held as collateral may be sold through a stockbroker as soon as the pledgor has failed to comply with their obligations under the pledge. Before any other steps are taken, it must be ensured that the sale complies with the requirements of the Argentine Securities and Exchange Commission which interprets the sale of shares through an out-of-court proceeding as a "public offering" of securities. Such a public offering is subject to regulations of the Argentine Securities and Exchange Commission and the Buenos Aires Stock Exchange, which govern public offerings.

5.1.3 Trusts

Trusts may be used as a means of taking security over most forms of movable and immovable assets.

In a security trust, certain property or rights of the debtor are transferred to the trustee, to ensure compliance with the debt. If the debt is not duly discharged by the debtor, the creditor can request the trustee to foreclose on the secured property.

Goods held in trust form a separate estate from the estates of the trustee and the settlor, and will therefore not be affected by any individual or joint actions brought by the trustees or the settlor's creditors, except in the case of fraud by the settlor. The beneficiary's creditors may exercise their rights over the proceeds of the goods held in trust and may be subrogated to the beneficiary's rights. The form of sale of the goods held in trust should be provided under the trust agreement.

Further to the above, as a trustee holds the assets as a separate estate, according to the Civil and Commercial Code these assets are not subject to insolvency proceedings of the settlor, trustee or beneficiaries, unless creditors can claim and provide evidence that their claims were established fraudulently, or if the trust is declared null and void in an insolvency proceeding.

There are no specific formalities for a security trust. General rules apply, and therefore if immovable property is secured by a security trust, a deed must be issued and the security must be registered in the Real Estate Registry.

5.1.4 Security assignments

Security assignments are typically limited to a means of taking security over rights or credits, including, without limitation, receivables. This is one of the main differences to a trust in which there is no such limitation, and trusts may be used as vehicles for taking security over most forms of movable and real estate assets.

As a general rule, Argentine law requires that a debtor be given notice of assignment for the assignment to be effective *vis-à-vis* the debtor and third parties. Such notice must be given to the debtor by public instrument, typically through a notary public, or by a private instrument bearing a "true date" (that is, a date on which an act occurs and the inevitable result is that the relevant instrument was already signed or could not have been signed at a later time). The

evidence to determine whether a date is "true" can be produced by any means, and must be rigorously assessed by a court.

According to the Civil and Commercial Code, the rules on pledge of credits are applicable to the assignment of credits as security.

5.1.5 Personal guarantees

Apart from secured rights, a trade creditor can secure the payment of unpaid debts with a personal guarantee (by a third-party guarantor). Personal guarantees do not grant priority over assets of the debtor but make third parties liable for the payment of the debtor´s debts.

There are two kinds of personal guarantees:

(a) *fianza*, which can be implemented through a guarantee agreement, a letter of guarantee or the inclusion of specific clauses in a finance, lease or other agreements; and

(b) *aval*, which is a personal guarantee of debts represented by certain instruments of credit (*título de crédito*), for instance, promissory notes and cheques. A single signature of the person as grantor in the instrument of credit is sufficient to create the guarantee.

Besides the fact that the *aval* is always a guarantee to a debt represented by an instrument of credit, the guarantor in an *aval* guarantee is jointly liable with the debtor for the payment of the debt. If, however, there is more than one guarantor in respect of the same payment obligation, it is possible to agree upon whom the obligation to pay first shall fall.

On the other hand, in a *fianza* guarantee, the rule is that, in the absence of an agreement to the contrary, the creditor needs to demand payment from the debtor first.

Another difference between the two kinds of personal guarantees is that the obligation of the guarantor in an *aval* guarantee is considered to be autonomous from the obligation of the debtor, so that whoever issues his signature in a title as guarantor is directly linked to the creditor. Thus, if, for instance, the creditor assigns the claim to a third party in good faith and the original transaction between the debtor and the creditor is later on considered to be void, the guarantors continue to be liable for the payment to the assignee. In a *fianza*, however, the guarantee is not autonomous from the debtor's obligations and, in this sense, the guarantor may not pay the creditor if the original obligation is void.

Finally, third-party guarantees are not affected by the bankruptcy, judicial or extrajudicial recovery of the debtor. The creditor maintains the right to enforce the obligation against the guarantors.

5.2. Unpaid debts and recovery

Before the filing of insolvency proceedings secured creditors can file executory proceedings and seek precautionary measures, whereas in insolvency proceedings creditors with secured

debts must submit their claims for payment to the trustee, providing supporting evidence thereof. It must be considered, however, that notwithstanding the requirement to file their claims, creditors holding a right *in rem*:

(a) constitute one of the mandatory categories of creditors, but any proposal to them in a corporate rescue, other than the payment in their original terms, requires the consent of all secured creditors;[15]

(b) are particularly protected under the Bankruptcy Law, and jurisprudence has consistently recognised these rights. For instance, bankruptcy adjudication does not suspend the accrual of interest on the secured claims provided that interest may only be payable out of the proceeds of the collateral after deduction of the court costs, any preferred interest accrued before the bankruptcy adjudication date, and the principal debt;[16]

(c) are granted a special priority for debts secured by: (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;[17]

(d) will be subject to the provision that upon bankruptcy adjudication, all foreclosure proceedings on credits secured with real property are consolidated before the bankruptcy court, and upon bankruptcy adjudication becoming final all individual foreclosure proceedings will be stayed;[18] and

(e) may request the realisation of the collateral at any time, provided that proof of the claim and privilege has been duly filed. In the event of reorganisation before the relevant court[19] and in the event of liquidation before the bankruptcy court,[20] the court will decide whether to admit or deny the request – if admitted, it will proceed at an ancillary special liquidation proceeding.

In the event of liquidation proceedings, the court and the trustee must examine the document(s) supporting the request and order the sale of the collateral by public auction. The court may request the posting of a security bond. After the public auction sale, creditors are paid the principal debt and accrued interest. The Bankruptcy Law establishes that the sale price cannot be less than the total amount of the claims secured with a mortgage or pledge. If the public bid or auction is unsuccessful, a second public bid or auction will be carried out without a base price and the court will decide on how to allocate the proceeds among the creditors.[21]

Despite the foregoing, the trustee may request court authorisation to satisfy the secured credit in full with liquid funds available if maintenance of the collateral is beneficial for the creditors.

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15 ABL, art 47.
16 *Idem*, arts 19 and 129.
17 *Idem*, art 241.
18 *Idem*, art 132.
19 *Idem*, art 20.
20 *Idem*, art 126.
21 *Idem*, arts 205, 206 and 209.

To this effect, the court may authorise the trustee to grant other security to the secured creditor or sell other assets.[22]

Immediately upon bankruptcy adjudication, the trustee may decide to continue the business activities of the debtor, and this decision must be confirmed by the court. If the continuation is decided, during the term of continuation enforcement of collateral needed for the business exploitation is stayed when the (i) secured credit is not due as of the bankruptcy adjudication date and the trustee performs the obligations due after such resolution in due time, (ii) secured credits are due as of the bankruptcy adjudication date but the security is not admitted by a final and non-appealable resolution, or (iii) secured creditor consented to the stay of the enforcement.

In addition, in the case of continuation the court may also order the stay of collateral enforcement proceedings for a maximum term of two years at the request of an employees' cooperative (formed for the purposes of bidding for the purchase of the debtor's equity in the competitive bidding process or otherwise requesting the acquisition of the debtor's equity prior to liquidation of the estate).[23]

Self-Assessment Exercise 2

Question 1

Which are the two main mechanisms for a trade creditor to secure the payment of unpaid debts?

Question 2

What is the main difference between the two abovementioned mechanisms?

Question 3

How do mortgages and pledges grant a priority?

Question 4

What is the difference between trusts and security assignments?

Question 5

How does an insolvency scenario affect secured rights and personal guarantees?

[22] *Idem*, art 207.
[23] *Idem*, art 195.

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

Insolvency proceedings are governed in Argentina by the Bankruptcy Law as amended and supplemented.

This statute is divided into four titles: "General Principles"; "Reorganization"; "Liquidation" and a fourth title that due to a transcription error in the text of the statute is not named but contains administrative provisions common to all of the other sections, including a chapter referring to legal preferences and other chapters that contain rules regarding professionals, procedure and small cases.

Other statutes play an incidental role in the Argentinian insolvency system, such as:

(a) The National Constitution;

(b) The Civil and Commercial Code, which contains a section entitled "Legal Entities", that regulates principles that apply to business and non-business associations (with the exception of corporations that are regulated by a specific statute). The Civil and Commercial Code also contains provisions on commercial and civil obligations, liabilities, debt instruments, securities, etcetera;

(c) The Companies Law (Law 19.550 as amended), which is the main piece of legislation for corporations. It contains provisions on the creation and extinction of corporations, the duties of officers, and the structure of management, amongst others;

(d) Law 27.349 that contains the main provisions concerning simplified stock corporations; and

(e) Civil and commercial procedural codes for the 23 Argentine provinces and the Autonomous City of Buenos Aires, since pleadings, written motions and other papers presented during insolvency procedures must be in conformity with the codes' procedural rules.

6.1.1 General requirements

All of the following requirements established in the Bankruptcy Law must be met before the court can declare the commencement of any insolvency proceeding:

6.1.1.1 Cessation of payments

Commencement of either restructuring or liquidation proceedings requires the debtor to be in cessation of payments, which is understood as not being able to regularly meet its obligations when they become due.

Cessation of payments is not a mere default on payments or breach of a single obligation. It is a general status of a permanent nature that constrains the debtor from fulfilling payments with ordinary resources on a regular basis, whatever the cause or nature of the debt may be.[24]

The petition for endorsement of an out-of-court restructuring on the other hand requires that the debtor is at least in a situation of general economic or financial difficulties.[25]

The Bankruptcy Law provides some examples of cessation of payments indicators, referred to as "revealing acts".[26]

Debtors qualifying to apply to any insolvency proceeding

The Bankruptcy Law regulates the judicial restructuring, out-of-court restructuring and liquidation proceedings (bankruptcy) of any of the following debtors:[27]

- individuals;
- private legal entities;
- legal entities partly or wholly owned by the national, provincial or municipal government;
- a deceased estate (as long as it remains separate from the heirs' estates); and
- debtors domiciled abroad with respect to assets located in Argentina when there are creditors in Argentina.

Insurance companies and financial entities cannot file a judicial restructuring as they are required to follow special insolvency proceedings.

Companies in the process of liquidation may also file a petition for the institution of voluntary insolvency proceedings.[28]

[24] *Idem*, art 1
[25] *Idem*, art 69.
[26] *Idem*, art 79. Also see the discussion in para 6.3.1 below in this regard.
[27] *Idem*, art 2.
[28] Idem, art 5.

6.1.1.2 Jurisdiction

The court that has jurisdiction is the court in the venue of the debtor's residence and, in the case of non-registered entities, the court where the entity has its business management and if different venues are involved, the venue of the main establishment.[29]

6.1.2. Insolvency proceedings

There are three main insolvency proceedings:

6.1.2.1 Restructuring or Reorganisation Proceedings

The main aim of this proceeding is to allow the debtor to restructure its outstanding debts while maintaining the administration of its estate.

The Bankruptcy Law sets out flexible procedures which tend to reduce the power of courts while increasing the freedom of action granted to debtors and creditors. Nevertheless, the following should be noted in this regard:

(1) Judges have a significant role as the "director" of the process and are entitled to use their power in order to investigate and deal with fraud, illegal activities and abuse of the bankruptcy system;[30]

(2) The debtor maintains the administration of its estate under the supervision of a trustee appointed by the court, who is an individual randomly selected from a list maintained by the court. The *síndico* is responsible for reviewing and advising the court regarding the debtor's proposed plan, disputed claims, and all other matters relating to creditors' rights;

(3) Creditors (including, without limitation, creditors with secured credits) must submit their claims for payment to the trustee, providing supporting evidence thereof. Creditors with admissible claims by judicial ruling are the only creditors whose claims will be counted for voting purposes in connection with a plan of reorganisation; and

(4) The court shall also appoint three separate creditors' committees during the course of a reorganisation. Firstly, a provisional creditors' committee amongst the three creditors with largest claims as set forth by the debtor, and an employee representative elected by the debtor's workforce. Secondly, a provisional creditors' committee amongst three creditors with the largest claims as set forth in the judicial ruling which verifies the claims and two more employees that shall add to the one originally appointed. Thirdly, the final creditors' committee set forth by the debtor's reorganization plan voted by a majority of creditors and confirmed by the court. The purpose of the provisional creditors' committee is to act as information agent and provide advice, whereas the purpose of the final creditors' committee is to play the role of overseer required at the stage of enforcement of the plan

[29] Idem, art 3.
[30] Idem, arts 52 and 274.

approved. In practice, these committees are not effective or have very limited effect. Creditors rarely accept appointment as members of the committees as they fear incurring severe and unidentified personal liabilities and a lack of compensation.

6.1.2.2 Out-of-court restructuring (Acuerdo Preventivo Extrajudicial).

The purpose of an Acuerdo Preventivo Extrajudicial (APE) is to negotiate a restructuring plan outside the formal framework of a judicial restructuring. If the debtor obtains the approval of the required majorities, it can submit the plan for judicial confirmation. The plan will bind all unsecured creditors when judicial confirmation is obtained.

No trustee is required to be appointed by the court. On exceptional occasions, the courts have however appointed one.

An out-of-court settlement is regulated in terms of contract law and may contain whatever provisions the debtor and the participating creditors have found to be convenient. After the amendments introduced to the Bankruptcy Act by the Law 25.589,[31] an out-of-court settlement, having been judicially confirmed, shall have the same effects as a restructuring plan obtained in a formal judicial reorganisation 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 holders 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 for it otherwise.

6.1.2.3 Bankruptcy or liquidation proceedings

The purpose of bankruptcy is to sell all the assets of the debtor and distribute the cash amongst the creditors.

The main consequence of liquidation proceedings is that the debtor is dispossessed of all its assets. A trustee (*síndico*) is appointed by the court to convert all the assets into cash and distribute the cash amongst the creditors.

Judges have a preeminent role as the "director" of the liquidation process. Creditors (including, without limitation, creditors with secured credits) must submit their claims for payment to the trustee, providing supporting evidence thereof.

The *síndico* has to file a proposal for the allotment to creditors of the proceeds obtained from the liquidation of the debtor's assets. The judge will then submit the proposal for the consideration of the creditors. Any creditor may challenge the final report prepared by the *síndico* and the court, in turn, may approve, modify or disallow any portion of the report before discharging the petition.

[31] As discussed in para 4.1 above.

The court shall also appoint a creditors' committee to oversee the liquidation of the assets.[32]

6.1.3. Small reorganisations and liquidations

The Bankruptcy Law contains two articles addressing small reorganisations and liquidations.[33] In order to qualify for a small reorganisation or liquidation, the debtor must have any one of the following characteristics: (i) liabilities totalling less than 300 minimum, vital and mobile wages,[34] (ii) no more than 20 unsecured creditors, or (iii) no more than 20 employees.
The "simplification" of the proceedings for small reorganisations or liquidations described in these two articles do not appear to be sufficient.

Article 289 provides the following:

> "Applicable system. In these actions neither the opinions set forth in Article 11, items 3) and 5), nor the organization of the creditor´s committee shall be necessary and the special cases system provided for by Article 48 of this law shall not apply. Supervision of the fulfilment of the reorganization plan confirmed by court shall be in charge of the trustee when a creditors committee has not been set up. The fees for his duties at this stage shall be 1% of what is paid to creditors."

In practice, the vast majority of reorganisation cases in Argentina involve small debtors. The Bankruptcy Law provides for long and convoluted reorganisation proceedings which are inefficient from an economical perspective and occupy substantial amounts of judicial and professional resources. A consensus exists in the professional community to greatly simplify these proceedings in order to avoid protracted resolution and great expense. However, even when initiatives have existed to replace articles 288 and 289 with a new set of different rules for small debtors (either enterprises or consumers), none of them took off since this has not been considered a priority by the legislative branch.

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32 ABL, art 201.

33 *Idem*, arts 288 and 289.

34 The "minimum, vital and mobile wage" is the minimum income set by Law as the social protection floor. The Argentine National Council of Employment, Productivity and Minimum, Vital and Mobile Salary, through Resolution 5/2023 issued on March 23, 2023, resolved an increase in the minimum monthly income of workers. The increase will be carried out in a staggered manner in three tranches, as follows:

- As from April 1, 2023 Ps$80,342;
- As from May 1, 2023 Ps$84,512; and
- As from June 1, 2023 Ps$87,987.

If converted to US dollars (using the exchange rate of July 3, 2023 of 1USD = Ps$270) the minimum, vital and mobile wage oscillates between USD 297 and USD 325 approximately.

6.1.4. Trustees, professionals and other stakeholders in insolvency proceedings.

6.1.4.1 Trustees

Trustees[35] in Argentina consist of certified public accountants.[36]

The Bankruptcy Law contains provisions regarding the creation of the two lists: (i) List A, comprised of firms which serve as trustees in large, complex reorganisations and liquidations, and (ii) List B, comprised of independent professionals who serve as trustees in the remaining cases.

The trustees serve on each list for a period of four years and the trustees are designated by each judge by a process of drawing lots.

6.1.4.2 Professionals

Other professionals who participate in the insolvency proceedings include:[37]

(i) Administrators: who serve by judicial appointment and generally have a business degree or experience relating to the debtor's business;

(ii) Liquidators: who serve to liquidate the debtor's assets and may include auctioneers, banks, investment banks or other specialised professionals; and

(iii) Appraisers: who calculate the value of the debtor's assets which comprise the bankruptcy estate.

6.1.4.3 Other stakeholders

Stakeholders' roles depend on the type of procedure.

In an out-of-court restructuring (APE), the debtor and the judge play the most important role.

In a judicial restructuring, the trustee will also play a significant role, as the trustee has to provide an opinion in many matters, including on the proof of claims and counsel the judge in different stages of the procedure (which counselling the courts generally follow). Although the law contemplates the creation of a creditors' committee, it is difficult for creditors to influence the outcome of the proceedings. In practice, most creditors are generally not interested in being involved in a creditors' committee. In fact, secured creditors may have more negotiating power on their own, without serving on a creditors' committee.

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35 *Idem*, art 253.
36 Also see the discussion in para 4.2.1 above in this regard.
37 ABL, arts 259, 261 and 262.

In a liquidation, the trustee is the most important player. Labour creditors also play a significant role, as former employees may form a co-operative and request continuation of the debtor's activity, and even acquire the debtor's assets as a unit. In this regard, auction proceeds may be set off against the amount of the labour claims.[38]

Labour claims enjoy different treatment and benefits in insolvency proceedings. The latest amendments to the Bankruptcy Law increased the rights of employees in insolvency proceedings through their inclusion in creditors' committees; allowing employees' co-operatives to participate in the competitive bidding process and to set off their member's labour claims against the purchase price for the acquisition of the debtor's shares, business or assets.

Moreover, on commencement of both a reorganisation or a liquidation proceeding, the court may authorise the immediate payment of labour claims with general or special preference, without the need to file proof of claims. The full payment will be performed immediately if there are funds available. If not, up to 3% of the debtor's gross monthly income shall be set aside to pay these claims *pro rata* until they are fully paid.[39]

In liquidations, labour claims for six-months' salary, severance payments and indemnification for health claims enjoy special preference in respect of the proceeds of inventory, raw materials and equipment located at the facilities where the employees rendered services; and general preference for all other assets of the estate. The priority extends to the principal debt and interest accrued during the previous two years after the claim became due and payable. The general preference labour claims will enjoy priority over an amount equal to 50% of the proceeds of the estate property after payment of the claims with special preference and the administrative expenses. Distribution among the general preference labour creditors will be made *pro rata* until full payment has been made up to the maximum amount described above; and any unpaid remaining balance will be paid *pari passu* with the unsecured claims.[40]

Finally, taxes on property and assets enjoy special preference and the principal amount of other taxes enjoys a general preference.[41] Therefore, the amount of all such taxes is excluded from the unsecured reorganisation plans or out-of-court restructuring agreements. In addition, the tax authorities do not consent to any payment proposals. On the contrary, federal taxes (and other local taxes) are subject to a special payment plan regime for debtors under reorganisation proceedings.

6.1.5. Basis of Argentina's insolvency system

Argentina's insolvency system is not necessarily debtor- or creditor-oriented as the Bankruptcy Law does not significantly deviate from neutrality. In fact, a balance is always pursued by the principles that guide the application of legal rules. For instance, article 159 of the Bankruptcy Law states the legislator's stance regarding stakeholders as follows:

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38 See "Restructuring and insolvency in Argentina: overview" available at https://content.next.westlaw.com/1-505-9725?__lrTS=20210619120530857&transitionType=Default&contextData=(sc.Default)&firstPage=true.

39 ABL, arts 16 and 183.

40 *Idem*, arts 241, 246 and 247.

41 *Idem*, arts 241 and 246.

> "Cases not contemplated. Rules. Insofar as concerns any monetary relationships for which no express provision is made the Court must render its decision by applying analogous rules, taking into account the due protection of the claim, the integrity of the debtor´s estate and business, the status of the insolvency proceedings and the general interest".

Nonetheless, given the recurring economic crisis that Argentina endures one could argue that the Argentinian insolvency system is likely to lean towards a debtor-friendly approach. Court decisions (that play a central role in insolvency procedures) have shown that judicial restructurings tend to last for many years given that the judiciary is particularly concerned with the preservation of productive activity and sources of work, even to the detriment of the creditors.

6.2 Personal / consumer bankruptcy

Since the enactment of Law 19.551 a unified insolvency regime, almost identical for both consumers and enterprises, came into force.[42]

Although consumers or individual insolvency proceedings are likely to be regulated by small reorganisations rules,[43] the "simplified" proceeding does not really provide any major advantage.

In fact, the unified insolvency regime causes severe problems in the judicial interpretation of many legal provisions, causing court congestion with insolvency cases. As a result, the insolvency regime focuses on corporations and therefore fails to regulate a simpler procedure with abbreviated terms; lower fees (it is a very expensive proceeding for consumers); and a clear and separate rule concerning the description and scope of discharge and relevant exceptions to this effect.

Self-Assessment Exercise 3

Question 1

What are the common substantive tests that have to be complied with in order to trigger either a judicial reorganisation or a liquidation proceeding?

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

[42] See the discussion in para 4.1 above.
[43] ABL, arts 288 and 289. Also see the discussion in para 6.1.3 above in this regard.

6.3 Corporate liquidation

6.3.1. General considerations

Under the Bankruptcy Law, the general purpose of a bankruptcy is to identify all the assets and liabilities of the debtor (from which the debtor is dispossessed), liquidate the debtor's assets and distribute the proceeds from such liquidation among all creditors in accordance with their verified claims and in the order of preference, after giving effect to priorities established by the Bankruptcy Law.

Bankruptcy also means termination or judicial liquidation of the legal entity. Upon bankruptcy declaration, the legal entity ceases to exist as it did before. The bankrupt entity is thereafter managed by the bankruptcy trustee (*síndico*) under the supervision of the competent court.[44]

An order for bankruptcy of the debtor may be entered upon for:

(1) Direct bankruptcies, by:

(i) the debtor's own petition for bankruptcy; or

(ii) a petition of a creditor for involuntary bankruptcy upon total or partial default of any liquid and unpaid obligation (involuntary bankruptcy);

(2) Indirect bankruptcies:

- upon the failure of a reorganisation proceeding or salvage proceeding;

(3) Other bankruptcies:

(i) by extension, by being a member of an entity having unlimited liability; or

(ii) by extension from another bankruptcy proceeding, upon compliance with certain requirements provided by law.

In the case of direct bankruptcies or bankruptcies by extension as to above, the debtor may request the bankruptcy proceeding to be converted into a reorganisation.

For the purposes of bankruptcy declaration, one sole unpaid creditor is sufficient,[45] and the petitioner must show the company is in cessation of payments.

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[44] The Bankruptcy Law does not deprive shareholders of a bankrupt company from ownership of their stock. Shareholders are unrestricted in keeping or selling stock at their discretion.

[45] ABL, art 78.

The Bankruptcy Law provides a more detailed list of cessation of payment indicators (referred to as revealing acts),[46] upon which a debtor may be judicially considered insolvent and for purposes of determining the "insolvency date":[47]

- the debtor's acknowledgment that it is unable to honour its debts or a previous reorganisation plan;
- default on payment of debts;
- the debtor's managers are missing or hiding and no representative is available;
- the administrative headquarters are shut down;
- the assets are being sold at an outrageously low price, are hidden or are transferred in payment of previous obligations;
- upon judicial reversal of any fraudulent and creditor-impairing activities; or
- whenever the debtor is performing any ruinous activities for purposes of obtaining economic resources.

If the debtor files for its own bankruptcy, insolvency shall arise out of the debtor's own confession. The filing of a petition for voluntary bankruptcy must include: (i) a description and the date of the start of the suspension of payments along with evidence of this, (ii) a statement of assets and liabilities appraised as of the petition date duly sworn by a certified public accountant, (iii) the debtor's financial statements for the previous three fiscal years, (iv) a list of creditors, (v) a list of judicial and administrative proceedings of economic nature pending or with an unenforced final judgment, and (vi) an enumeration and submission of the debtor's commercial and other corporate books. However, an omission of any of the abovementioned requirements shall not preclude the adjudication of bankruptcy.[48]

If the petition is made by a creditor, the creditor must (i) submit evidence that the debtor qualifies for bankruptcy proceedings; (ii) offer sufficient evidence of its claims (that are enforceable); and (iii) provide evidence that the debtor has suspended or defaulted compliance of its obligation to the petitioning creditor, or is otherwise unable to comply regularly with its obligations, according to one of the abovementioned (or another) indicators. When the claim in question enjoys a special preference according to the stipulations of the Bankruptcy Law, the

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46 *Idem*, art 79.

47 The initial date of cessation of payments is judicially set forth by a special proceeding and judicial ruling in accordance with article 115/117 or the Bankruptcy Law. The commencement date of the insolvency must be reported by the bankruptcy trustee in the general report and the interested parties (the directors, *etcetera*) may file objections thereto within a 30-day term. At that stage, they may offer submissions of the relevant evidence, which may be allowed by the court, should it be deemed necessary.

48 ABL, arts 82 and 86.

creditor shall expeditiously prove that the assets involved are insufficient to settle such claim. This proof shall not be necessary in the case of labour claims.[49]

In cases of indirect bankruptcy, insolvency is evidenced by the failure of a reorganisation proceeding or salvage proceeding.[50]

In cases of extension of bankruptcy to third persons their insolvency is not required since bankruptcy adjudication is as a result of either the debtor's shareholders' unlimited liability,[51] or of exceptional circumstances[52] as explained below.[53]

In the case of an involuntary bankruptcy, there is no provision for bringing pre-bankrupcty legal action. After the petition has been filed with the proper court and all necessary evidence has been presented, the court will give the debtor five days' notice to provide an explanation for the reasons why payment of the obligations in favour of the petitioning creditor have not been paid, and prove that it (the debtor) is solvent. If the debtor does not demonstrate its solvency, the court will declare that the debtor is bankrupt.[54] The petition may be dismissed if during that five day period the debtor provides evidence to the court that it is not in suspension of payments (that is, in relation to the amounts owed to the plaintiff).

If requested by a creditor, the court may order preliminary injunctions to ensure that the debtor's property will remain intact, provided that the creditor adequately accounts for the risk should the injunction not be granted.[55]

In any case, direct or indirect bankruptcies commence after the court passes a bankruptcy judgment.

The judgment declaring bankruptcy must, among others:[56]

(a) properly identify the bankrupt person, or the partners in the case of a company of unlimited liability;

(b) issue a general injunction forbidding the debtor from disposing of any of its assets and ordering the recording thereof and of the bankruptcy in the relevant public registries;

(c) order the bankrupt person and any relevant third parties to deliver the debtor's assets to the trustee;

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49 *Idem*, arts 80 and 88.
50 See para 6.5.2.7 (Conversion) below in this regard.
51 *Idem*, art 160.
52 *Idem*, art 161.
53 See para 6.3.7 in this regard.
54 ABL, art 84.
55 *Idem*, art 85.
56 *Idem*, art 88.

(d) order the debtor to give over to the trustee all documents related to the accountability of its business and any commercial books it has kept;

(e) forbid third parties to make payments to the bankrupt person;

(f) order that all correspondence be intercepted and given over to the trustee;

(g) set a date upon which the trustee (who will act as liquidator) will be selected by drawing lots;

(h) order the liquidation of the debtor's assets;

(i) order the publication of legal notices in the Official Gazette and other newspapers, as required by law; and

(j) set a deadline for creditors to file their claims and credits before the trustee (within 20 days after the notices referred in (i) above have been published).

Liquidation proceedings are inefficient in Argentina and can last for several years. Timing will significantly depend on the volume and nature of debt and the size of the debtor.

6.3.2. Effects of bankruptcy

The main effects of bankruptcy are as follows:

- The debtor loses possession of its assets except for certain rights specifically enumerated in the Bankruptcy Law (articles 106,107,108 ABL).[57]

  In accordance with the law the bankrupt is dispossessed of his assets existing as at the date of the adjudication of bankruptcy, and any others acquired by the debtor until his discharge.

  The court will then appoint a trustee, who will preserve and administer the debtor's assets and, among other things, collect all the debtor's receivables.[58] As the bankrupt loses his capacity to act in all litigation regarding the dispossessed assets, the trustee must act on the debtor's behalf.[59]

- The court will further order the closing down of the debtor's premises and the suspension of all of its activities. However, the trustee might recommend to the court to continue the debtor's business and may apply to the court for authority to actively continue to operate the debtor's business, (a) upon proof that a shutdown will cause irreparable injury to creditors and to the preservation of the bankrupt's net worth, or (b) if two-thirds of the debtor's employees so request.[60] The national government should provide technical

[57] *Idem*, arts 106 to 108.
[58] *Idem*, arts 109 and 182.
[59] *Idem*, art 110.
[60] *Idem*, arts 189 and 195.

guidance to the debtor's employees (if requested), should they continue to run the business with the court's authorisation.[61]

- Upon a declaration of bankruptcy, actions taken by the bankrupt debtor in respect of property of the estate, as well as payments made or received, are, by operation of law and without judicial declaration, void in respect of creditors. The debtor may not receive payments of any kind.[62]

- The debtor's former managers and directors are required to deliver custody of the business, including all books, records, real property and equipment, to the trustee and are required to provide the judge and trustee with all assistance that they may require in order to clarify the state of the debtor's business and to verify the claims against the estate. They are under the obligation to furnish the court with any information that may be requested. If a director fails to appear, the judge may seek the aid of public force to have directors appear in court.[63]

- The bankrupt is disqualified as from the date of bankruptcy.[64]

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

  The disqualification of an individual ceases by operation of law, one year after the date of the bankruptcy adjudication. When the debtor is an individual, he is dispossessed of his assets existing as at the date of the adjudication of bankruptcy and any others acquired by him until his disqualification ceases.

  The disqualification of companies is definitive unless there is a conversion under the terms of article 90,[65] for conclusion of the bankruptcy case by acceptance,[66] or by full payment.[67]

  The debtor company's directors are also disqualified from performing commercial activities within the territory of the Argentine Republic for a period of one year.

  This disqualification is based on objective parameters – it is focused on the bankruptcy condition *per se*, regardless of the originating causes thereof (as opposed to subjective parameters that focus on fraudulent or negligent behaviour). This is an exception to the legal regime of director liability set forth in Argentine Companies Law.

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61 *Idem*, art 191 *bis*.
62 *Idem*, art 88(5).
63 *Idem*, arts 88(3), (4), (7) and 102.
64 *Idem*, art 234.
65 See para 6.5.2.7 (Conversion) below in this regard.
66 *Idem*, arts 225 *et seq*.
67 *Idem*, arts 228 *et seq*.

Two groups must be identified: (i) current members of the board of directors at the time of the bankruptcy adjudication, and (ii) those persons who are no longer members of the board of directors but that have held office since the cessation of payments (the insolvency date).

Disqualification of directors that belong to the first group, is effective for one year from the date of the bankruptcy award. Disqualification of directors who have held office since the insolvency date but are no longer directors on the date of the bankruptcy award, is effective for one year from the judicial resolution that fixes the insolvency date.[68]

The term of the disqualification may be reduced or removed by the court if the representatives have not committed fraud or any other act in violation of criminal law provisions. On the other hand, if there is a criminal action filed against a director the disqualification period is extended until the termination of the criminal action.

- The court orders the immediate liquidation and auction of the company's assets.[69]
- All creditors existing prior to the adjudication of bankruptcy should file a proof of claim for the purpose of being registered with the court.[70]
- All pending claims become due and payable as of the bankruptcy award date.[71]
- Accrual of interest on unsecured claims (other than labour claims) is suspended; and interest on secured debts will continue to accrue, but may only be claimed to the extent of amounts realised from the security interest.[72]
- The debtor or its directors or managers must request authorisation from the court to leave the country until the *síndico* files the general report. Such authorisation is granted upon reviewing each particular case and it can also be denied if the court considers it is essential for the director to remain in the country in order to clarify the financial condition of the debtor's company. Directors who reside outside of Argentina are not prohibited from entering the country, as the restriction only applies for the purpose of leaving the country.[73]
- Any exchange of emails or other communications with the debtor company will be delivered to the trustee.[74]

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[68] The initial date of cessation of payments is judicially set forth by a special proceeding and judicial ruling in accordance with article 115/117 or the Bankruptcy Law. The commencement date of the insolvency must be reported by the bankruptcy trustee in the general report and the interested parties (the directors, *etcetera*) may file objections thereto within a 30-day term. At that stage, they may offer submissions of the relevant evidence, which may be allowed by the court, should it be deemed necessary.

[68] ABL, arts 82 and 86.

[69] *Idem*, arts 203 *et seq*.

[70] *Idem*, arts 126 and 200.

[71] *Idem*, art 128.

[72] *Idem*, art 129.

[73] *Idem*, art 103.

[74] *Idem*, arts 88(6) and 114.

- Where there are reciprocal pending contractual undertakings between the debtor and any third party, the court will determine whether or not the agreement should be terminated (however until such time the agreement will be suspended, with limited exceptions).[75]

- All non-integrated capital contributions from the company's shareholders should be paid in full.[76]

- All proceedings regarding unsecured claims against the debtor are consolidated at the court that hears the bankruptcy proceedings. Subsequently these are prosecuted with the trustee and no forced execution proceedings may take place. Upon bankruptcy adjudication becoming final the proceedings will be stayed. New proceedings on unsecured claims are not allowed to be initiated.
  The automatic stay does not apply to lawsuits pertaining to labour matters or those of extensive evidence production,[77] both of which may be continued before the courts where they were initially filed. The above obligation to suspend litigation proceedings and remit the litigation to the liquidation court also does not apply to divorce and associated ancillary relief proceedings, actions for expropriation by the government or claims where the debtor is a joinder defendant.[78]

- All foreclosure proceedings on claims secured by real property (*in rem* guarantees) are consolidated before the bankruptcy court, and upon bankruptcy adjudication becoming final all individual foreclosure proceedings will be stayed.[79]

  Provided that proof of the claim and privilege has been duly filed, secured creditors may request the realisation of the collateral at any time at court in accordance with articles 126 and 209 of the Bankruptcy Law. The court will decide whether to admit or deny the request and if admitted, it will proceed at an ancillary special liquidation proceeding. The trustee may however request court authorisation to satisfy the secured credit in full with liquid funds available if maintenance of the collateral is beneficial for the creditors. To this effect, the court may authorise the trustee to grant other security to the secured creditor or sell other assets.

  Immediately upon bankruptcy adjudication, the trustee may decide to continue the business activities of the debtor, and this decision must be confirmed by the court. If the business activities are continued the enforcement of collateral needed for the business exploitation is stayed during the term of continuation when (i) the secured credit is not due as of the bankruptcy adjudication date and the trustee performs the obligations due after such resolution in due time, (ii) the secured credits are due as of the bankruptcy adjudication

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75 *Idem*, art 143.
76 *Idem*, art 150.
77 Extensive evidence production proceedings are also called ordinary proceedings, and are long-term, full-knowledge and proof-driven. For instance, damages claims.
78 *Idem*, art 132.
79 *Ibid*.

date but the security is not admitted by a final and non-appealable resolution, or (iii) the secured creditor consented to the stay of the enforcement.[80]

In addition, in the event of continuation the court may also order the stay of collateral enforcement proceedings for a maximum term of two years at the request of an employees' co-operative (formed for the purposes of bidding for the purchase of the debtor's equity in the competitive bidding process or otherwise requesting the acquisition of debtor's equity prior to liquidation of the estate).[81]

- All claims denominated in foreign currency are converted into Argentine pesos at the exchange rate as of the bankruptcy adjudication date or the stated maturity (whichever is earlier) at the option of the creditor.[82]

- Arbitration clauses are inapplicable except if the arbitral tribunal was already constituted prior to the bankruptcy adjudication.[83]

6.3.3. General treatment of agreements

If all the obligations of the debtor under an uncompleted contract have been fulfilled as at the date of bankruptcy, any obligations emerging from such agreement must be complied with by the debtor's counterparty.[84] On the other hand, if the counterparty has fully discharged its obligations and at the date of bankruptcy there are unfulfilled obligations of the debtor, the counterparty must file a claim for its credit with the trustee.

However, if at the date of bankruptcy both parties have outstanding pending obligations, the creditor has to inform the court of any agreement with pending obligations, and of its plan to request the termination or continuation of such agreement within 20 days after the notices announcing the bankruptcy proceedings are published.

The trustee has to render an opinion as to whether such uncompleted agreements should be continued or terminated. The court, however, is vested with discretionary powers to determine whether such agreements shall be fulfilled or terminated within a short period of time. If the operations of the debtor have been interrupted, the agreement is stayed until the court reaches a decision in connection with the contract's termination.

If the contract is continued, the creditor would be entitled to full payment of the amounts owed to it under the agreement still in force. Nevertheless, if the court has not yet reached a decision within 60 days after the notices announcing the bankruptcy were published, the creditor may request the termination of the agreement. However, if within 10 days following such petition the court notifies the creditor of its intention to have the agreement continued, it will not be terminated.

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80 *Idem*, art 195.
81 *Ibid*.
82 *Idem*, art 127.
83 *Idem*, art 134.
84 *Idem*, arts 143 *et seq*.

In urgent cases, the court may shorten the periods referred to above.

If an agreement is not terminated because of a breach of a contractual obligation by the counterparty, or if it was not judicially claimed before the date of bankruptcy, any clauses concerning the termination of an agreement in the case of breach of contract (such as the occurrence of certain events of default), cannot be invoked in the event of bankruptcy of the defaulting party. The filing of the claims may only be made when it has taken place prior to the date on which the debtor is declared bankrupt – hence, it requires that the obligations of both parties become due prior to the bankruptcy judgment.[85]

Certain other agreements (such as master agreements, agreements to be performed over a certain period of time or agreements where the personal qualities and capabilities of the debtor are required) are automatically terminated upon the declaration of bankruptcy.[86]
The Bankruptcy Law authorises the set-off of mutual pre-petition claims.[87]

6.3.4. Maintaining the business

In certain circumstances, the trustee may decide on the immediate continuation of the debtor's activities, subject to court approval.[88] This could be the case for public utilities; to avoid damages to the creditors; preserve the assets of the estate; or at the request of at least two-thirds of the debtor's employees organised in a workers' co-operative in order to preserve employment.[89]

To keep the business going, the bankruptcy trustee should file a going-concern plan, which states:

(i) the chances of keeping the business as a going concern without assuming new liabilities;

(ii) the advantages of such a plan for the creditors;

(iii) the advantages for third parties;

(iv) the business plan;

(v) the ongoing commercial agreements that should be maintained;

(vi) a plan for any necessary changes to the company's structure;

(vii) a list of assistants needed for the management of the business; and

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85 *Idem*, art 145.
86 *Idem*, art 147.
87 *Idem*, art 130.
88 *Idem*, arts 189 *et seq*.
89 It is usual in Argentina that the workers obtain court approval to incorporate a workers' partnership (*Cooperativa de trabajo*) for the purpose of keeping the business as a going concern, and thus maintaining their salaries.

(viii) an explanation of how the expenses and debts are to be paid.

There is no obligation upon the debtor company's shareholders to contribute to the expenses of the business plan filed by the bankruptcy trustee.

The court's authorisation should be granted in any of the following scenarios:

(a) if an interruption in the business will lead to a substantial reduction in the realisation value of the debtor's assets;

(b) to conclude a production cycle;

(c) if the company is economically viable; or

(d) to preserve the workers' employment.

Court approval for such a plan will state the term for such continuation, the assets that are to be allocated for such purposes, the staff to be involved, the commercial agreements to be maintained and the information flow required in the future.

If the debtor's activities are continued, the trustee or the workers' co-operative, whichever is the case, will manage the assets of the estate with the powers to perform all acts pertaining to the ordinary course of business. Any act beyond this limitation, including incurring unsecured or secured debt, is subject to the prior approval of the court.

If no decision is made as to the continuation of the debtor's activities, the trustee will move forward with the liquidation of the assets of the estate. Before beginning the liquidation process, the workers' co-operative may make a request to the court to purchase the debtor's equity and compensate for this purchase price by setting-off their labour claims.

6.3.5. Liquidation procedure

6.3.5.1 Proof of claims and trustee's reports

A declaration of insolvency means that all creditors existing prior to the adjudication of bankruptcy can only exercise their rights over the debtor's assets in the manner set out in the Bankruptcy Law. All creditors, including without limitation, preferred or secured creditors, must submit proof of their claims, preferences and priorities and provide the *síndico* with information as to the total amount, reason and privileges of each claim. As with restructurings, there is a nominal fee payable for such filings.

Throughout the liquidation proceeding the *síndico* has the essential functions of determining the debtor's liabilities (due to the fact that the *síndico* receives and examines the proof of claims filed by creditors); and counselling the judge as to the liabilities in the individual report.[90] The

[90] ABL, art 35.

síndico also must produce a general report[91] expressing his opinion regarding, amongst others, the probable value of the assets and the management of the insolvent corporation.

In summary, the steps of the procedure described above are:[92]

(a) presentation before the trustee by the creditors submitting their claims for payment and proof thereof (it is possible for other creditors or the debtor himself to claim the invalidity of the claims submitted by other creditors);

(b) the trustee issues an individual report with an opinion on each of the credits; and

(c) the court resolves whether to consider the claim admitted as valid or not, and such resolution may be appealed.

6.3.5.2 Liquidation of the debtor's assets

The trustee is entitled to foreclosure the debtor's assets in order to pay admitted creditors from the sale proceeds within four months from the date of the bankruptcy award.[93] In exceptional cases, the court may authorise an extra 30 days for payment to be made. However, in practice, the liquidation of assets takes much longer depending on the complexity of each proceeding, the amount involved, and the characteristics and location of the assets.

The Bankruptcy Law envisages different ways of liquidating assets, in an order of preference:

- where the debtor is a legal entity, the sale of the company as an ongoing concern. In this case, the auction mechanism is a public bid or public auction (to be determined by the court) and the base price cannot be less than the valuation suggested by the auctioneer (based on the business' market price);[94]

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

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

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

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91 *Idem*, art 39.
92 *Idem*, arts 200 *et seq*.
93 *Idem*, arts 203 *et seq*.
94 The ABL establishes that the sale price cannot be less than the total amount of the claims secured with a mortgage or pledge. If the public bid or auction is unsuccessful, a second public bid or auction will be carried out without a base price and the court will decide on how to allocate the proceeds among the creditors.

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

The assets may be sold through one or more public auctions; direct sale; or sale on a securities exchange or market where these are traded or registered.

6.3.6. Final distribution of proceeds to creditors and preferences

Upon auction of all of the debtor company's assets, the bankruptcy trustee must file a report detailing the auction proceeds and a plan for final distribution amongst the registered creditors.

Payments are made in court and in a standardised form, in the so-called "insolvency proceedings dividend".[95] This is the local currency which creditors receive considering the preferences set forth by the Bankruptcy Law.

The debtor company and / or the creditors may file objections to the report within 10 days of its filing. The final distribution of funds should be approved by the court and the creditors should be paid in accordance with the court's decision.[96]

The creditors' right to collect amounts to which they are entitled in the distribution lapses one year after the date of its approval. The lapsing occurs by operation of law and is declared at the discretion of the court. The uncollected amounts are allocated to the State funds to further common education.

6.3.6.1 Legal preferences

In case of insolvency proceedings only the claims listed in the Bankruptcy Law shall be entitled to preferences according to its provisions.[97]

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

The Bankruptcy Law provides for two types of preferences: (a) special preferences, which are granted exclusively over certain specific assets of the debtor; and (b) general preferences, which are granted over all of the debtor´s assets.

Before paying claims enjoying special preferences, funds must be reserved from the proceeds of the specific asset in question to defray those expenses entailed by its preservation, custody, management and realisation during the insolvency proceedings. Likewise, an amount shall be

[95] ABL, art 221.
[96] *Idem*, arts 218 *et seq*.
[97] *Idem*, arts 239 *et seq*.

set to meet the expenses and fees of the officers involved in the bankruptcy proceedings, referred exclusively to the measures connected with such assets.[98]

Special preferences

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

- expenses incurred in the constitution, improvement or maintenance of a thing, to such a thing, while it remained in the possession of the insolvent for whose account the expenses were incurred;[99]
- labour creditors for salaries due from the company to employees for six months, and for severance or labour accidents (this preference only applies to the debtor company's assets located at the site where the employee performed his duties);[100]
- creditors for taxes and contributions on certain assets;[101]
- creditors secured with a mortgage, pledge or guarantee on certain assets, and creditors with bonds secured by special or floating guarantee;[102]
- creditors who have the right to withhold certain assets of the debtor company (provided that no other creditor had a previous right on such asset);[103] and
- claims set out in specific legislation.[104]

The priority extends only to the amount of principal debt owed, except for: (i) the interest accrued in respect of labour claims during the last two years after the claim became due and payable, and the litigation costs and expenses in relation thereto, and (ii) all interest accrued during the two years immediately preceding the bankruptcy adjudication and remunerative interests accrued since the bankruptcy adjudication and until effective payment, in respect of the claims secured by means of mortgage, pledges or guarantee on certain assets; and creditors with bonds secured by special or floating guarantee.[105]

General preferences

Once all secured creditors with special preference have been paid, the claims arising from the maintenance, management and liquidation of the assets of the bankrupt and from the formalities to process the insolvency proceedings are settled before other claims against the

[98] *Idem*, art 244.
[99] *Idem,* art 241(1).
[100] *Idem,* art 241(2).
[101] *Idem,* art 241(3).
[102] *Idem,* art 241(4).
[103] *Idem,* art 241(5).
[104] *Idem,* art 241(6). Claims described in title III, article IV of Law 20994; in title IV, article VII of the Aeronautical Code (Law 17285); in article 53 of Law 21526; and those set forth in articles 118 and 160 of Law 17418.
[105] ABL, art 242.

insolvent. These claims must be paid when they become due without the need for acknowledgment. Should the funds to meet these claims prove to be insufficient, the distribution is made *pro rata* amongst the creditors.[106]

Thereafter creditors with general preferences, which are granted over all of the debtor's assets, are entitled to collect their claims from the proceeds of the debtor company's assets liquidation in the following order:[107]

- labour creditors in respect of salaries due from the company to employees for six months, severance and labour accidents, vacations and any other amount due from the company as a result of a labour relationship (this only applies when it was not possible to collect from the proceeds of the liquidation of the debtor company's assets located at the site where the employee performed his activities);
- the principal amount of debt owed to the national, provincial or municipal social security system;
- the principal amount of taxes and rates owed to the National, Provincial or Municipal treasuries; and
- the principal amount of debt up to Ps$20,000 (USD2,200) on credit bills accepted for each vendor or lessor.

Labour creditors in respect of salaries are entitled to collect from 100% of the proceeds of the liquidation after reserve funds for expenses,[108] payment of the claims with special preference[109] and maintenance and court expenses[110] have been deducted; and to the exclusion any other secured creditor with a general preference.

The remainder of the creditors with a general preference are entitled to collect their claims from 50% of the proceeds remaining once all of the debtor company's assets are liquidated and all creditors with special preferences and with a general labour preference for salaries have been paid out.

Any distribution amongst the creditors holding claims with general preference will be made *pro rata* until their full payment up to the maximum amount. Should the total of their claims exceed 50%, the creditors must collect the unpaid portions of their claims on a *pro rata* basis along with the unsecured creditors.

Unsecured creditors

The remaining 50% of money not distributed amongst the former classes is utilised to pay the general creditors on a pro rata basis. These are all the creditors without special or general

[106] *Idem*, art 240.
[107] *Idem*, art 246.
[108] *Idem*, art 244.
[109] *Idem*, art 241.
[110] *Idem*, art 240.

preference, and the creditors that either lost those preferences or have not been able to fully collect according to their original preference.[111]

Conventionally subordinated creditors

A creditor may agree with a debtor to subordinate its credit (claim) to other creditors, and this is known as "subordinated credit".[112] The ranking of this class of credit is determined by the parties' agreement. However, the parties may only agree to postpone payment, but not to improve the ranking.

In liquidation cases, the possibilities of this class of creditors collecting any money are remote.
Foreign credits payable after all others have been settled

If parallel proceedings are opened in Argentina and in a foreign country resulting in bankruptcy being declared in Argentina, creditors in the foreign bankruptcy proceeding are subordinated to creditors in the Argentine proceeding.[113]

In liquidation there rarely, if ever, exists any remaining money. The possibility of collecting is, therefore, for all practical purposes virtually non-existent. This rule of subordination of some foreign credits is not applied in reorganisation proceedings, as further discussed below.

Holders of equity of the bankrupt company

If, after the satisfaction of all the classes discussed above there is a surplus, it has to be delivered to the debtor. As in the case of bankruptcy liquidation the company ceases to exist, the remaining money shall be distributed among the partners or the shareholders.

6.3.6.2 Post-petition credits

Generally, unsecured post-petition financing does not enjoy any priority, except where the proceeds of such financing are used for the payment of any costs and expenses relating to the maintenance and administration of the estate, in which case the court may grant such financing the same priority as that of the administrative expenses.

Furthermore, the debtor's debts that originated after its bankruptcy may be the object of new reorganisation proceedings, which will only comprise the remaining assets after the first liquidation was performed and its produce distributed, and any assets the debtor may have acquired after being discharged from bankruptcy.[114]

[111] *Idem*, art 248.
[112] *Idem*, art 250.
[113] *Idem*, art 4.
[114] *Idem*, art 104.

6.3.7. Risks and implications of bankruptcy[115]

6.3.7.1 Pre-petition void or voidable transactions (clawback period)

Certain transactions carried out by the debtor within the suspicion or clawback period are void or voidable.

The clawback period is the period starting with the cessation of payments as determined by the court (the insolvency date) and ending on the date when the debtor files the request for reorganisation, or is declared bankrupt. The clawback period cannot extend more than two years from the date immediately preceding the date of filing of the request for reorganisation or the date of the adjudication of bankruptcy.

The following acts performed by the debtor within the suspicion period are declared non-binding on creditors by the bankruptcy judge without the need of express action or petition or any further procedures: (i) transactions without consideration, (ii) advance payments of debts falling due, according to the relevant title, on the day of the bankruptcy or later, and (iii) the creation of mortgages, pledges or any other preferences, with respect to immature obligations which originally were not covered by such security.[116]

Other acts performed within the suspicion period that are prejudicial to the interests of the creditors may be declared not binding on creditors by the bankruptcy judge, if those persons acting with the bankrupt company had knowledge of its suspension of payments. The affected third party has the burden of proving that the act did not cause any loss to the bankrupt company,[117] and should be averred by means of an action instituted before the court hearing the bankruptcy proceedings, and is processed via ordinary proceedings. The action is pursued by the trustee and is subject to prior authorisation by an absolute majority of the unsecured debt which has been acknowledged and declared admissible.

Without detracting from the trustee's responsibility, any interested creditor may bring this action at his own expense after thirty days have elapsed after the petition has been filed with the trustee to bring the action. Upon declaration of ineffectiveness the creditor shall have the right to be reimbursed for expenses incurred and shall enjoy a special preference in respect of assets recovered, as determined by the court, of between one-third and one-tenth of the proceeds thereof, up to the amount of the creditor's claim.

The ineffectiveness of an act based on fraud between the third party and the debtor may also be declared as such under the Civil and Commercial Code[118] by means of an action instituted

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[115] For further insight on the subject here only summarised please see https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2016/12/Global-Restructuring-Insolvency-Guide-New-Logo-Argentina.pdf and "Insolvency and directors' duties in Argentina: overview" available at https://uk.practicallaw.thomsonreuters.com/3-606-0185?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[116] ABL, art 118.

[117] *Idem*, art 119.

[118] Civil and Commercial Code, arts 332 et seq and 338 et seq.

before the court hearing the bankruptcy proceedings, processed via ordinary proceedings and without need for prior authorisation.

Transactions not subject to the avoidance action are:

- transactions made by the debtor in the ordinary course of business;
- transactions not within the ordinary course of business but celebrated with the prior authorisation of the court during a reorganisation process or during the implementation of the reorganisation plan; and
- transfers made by the debtor with the authorisation of the court during a reorganisation process or during the implementation of the reorganisation plan.[119]

The declaration set forth in article 118 and the action that may be brought under articles 119 and 120 shall become statutorily barred three years from the date of the bankruptcy decree. The assets that are made part of the insolvency proceedings estate by virtue of the provisions of articles 118 to 123 are subject to dispossession.[120]

6.3.7.2 The liability of third parties

The general principle is that the declaration of bankruptcy only affects the debtor and its assets. However, the Bankruptcy Law also provides for certain circumstances in which third parties may be affected by the declaration. These generally relate to acts and behaviours carried out by third parties that may be considered to have been fraudulent towards the debtor's creditors, or that may have had a direct impact on the debtors' insolvency.

The Bankruptcy Law provides for two different legal actions that could be initiated in those abovementioned scenarios: the extension of bankruptcy and the liability actions.

The Bankruptcy extension process

A debtor's bankruptcy adjudication may be extended to a debtor's shareholders with unlimited liability in accordance with article 160 of the Bankruptcy Law.

Moreover, in exceptional circumstances according to article 161 of the Bankruptcy Law, in a bankruptcy scenario, bankruptcy can be extended other parties as follows:

(a) Interest contrary to the corporate purpose

Bankruptcy can be extended to any individual or corporation who, pretending to be the debtor company, has performed certain acts in his / its own interest and has disposed of the

[119] ABL, art 121.
[120] *Idem*, art 124.

debtor's assets and rights as if they belonged to him / it;, thus committing fraud in detriment of his / its creditors.

With regard to the existence of fraud in detriment of the debtor company's creditors, fraud is deemed to exist by virtue of the bankruptcy award.

(b) Abuse of control

Bankruptcy can be extended to any controlling shareholder of the debtor company, if such controlling shareholder has unduly diverted the debtor company's interests[121] for its own benefit (or for the benefit of the economic conglomerate), and if both of them are under a unified corporate management.

As in other countries, Argentine law does not make companies of an economic group liable *per se* for the obligations of their subsidiaries and affiliates. According to article 172 of the Bankruptcy Law, unless one of the circumstances described in article 161 arises (which includes abuse of control), the bankruptcy award of one of the legal entities which is a member of an economic conglomerate will not necessarily be extended to the other members thereof.[122]

(c) Commingling of assets and liabilities

Bankruptcy can be extended to any other individual or corporation whose assets and debts are commingled with those belonging to the debtor company.

The commingling of assets and liabilities exists when it is impossible to differentiate the assets and liabilities of different companies. Some factors of what an Argentine court could take into account to establish whether the commingling of assets and liabilities has taken place are:

- common use (sharing) of revenues not duly recorded in the accounting books;
- joint liabilities without reasonable consideration;
- systematically securing commercial and financial obligations;
- use of a common cash box;

[121] The debtor company's interest lies in its own corporate purpose.

[122] Argentine law does recognise, however, the exceptional remedy of piercing the corporate veil and extending liability to the parent or controlling company when the acts performed by the other company (usually, branches or local corporations) have a non-corporate or business purpose, violate the law, public order or good faith or affect third parties' rights (in terms of article 54 of the Companies Law 19,550). In practice, piercing of the corporate veil has a similar effect as the extension of bankruptcy, and in both cases they are decided on a case-by-case basis in a very restrictive manner. Also see the discussion in para 6.5.2.6 in this regard below.

- arbitrary allocation of profits and losses for purposes of balancing income statements or tax accounts; and

- granting of mutual loans disregarding repayment ability.

These factors call to mind theories of liability that arise in the United States and elsewhere – fraudulent transfers, veil piercing, and substantive consolidation.

Article 164 of the Bankruptcy Law provides for specific proceedings for the extension of bankruptcy. These proceedings, called ordinary proceedings, are long-term, full-knowledge and proof-driven. Ordinary proceedings can be initiated either by the bankruptcy trustee or by any creditor from the date of the bankruptcy award up to six months after the bankruptcy trustee's filing of the general report in court.[123]

The court's decision on bankruptcy extension means the effective adjudication of bankruptcy upon the individual (or corporation) concerned.[124] The bankruptcy extension is effective from the date on which it is pronounced by the court.[125] The entire bankruptcy proceedings (the original bankruptcy proceedings plus other extended bankruptcy proceedings) are presided over by the court with jurisdiction over the bankruptcy proceedings of the corporation holding the largest assets.[126]

The court will order that the estates of the debtor and any controlling shareholder be treated as a single estate only to the extent that the assets and liabilities of the debtor and its controlling shareholder are commingled.[127] In all other cases, the estate of the debtor and that of any other person are treated separately.[128]

The court's decision extending bankruptcy shall have the same effect set forth in article 88 of the Bankruptcy Law discussed above.[129]

In one particular case, the Supreme Court decided to extend the bankruptcy of an Argentine subsidiary to the American and English entities that were members of the same economic conglomerate.[130]

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[123] The date on which the bankruptcy trustee should file the general report is set by the court upon the adjudication of bankruptcy. In the general report the trustee describes, amongst others, the assets and liabilities of the debtor and the reasons that caused the cessation of payments.

[124] The extension of bankruptcy implies that the third party will automatically be in a liquidation stage, irrespective of its financial status (ie, it is not required to undergo a cessation of payments situation) and therefore be liable for the payment of the former bankruptcy's creditors.

[125] ABL, art 171.

[126] *Idem*, art 162.

[127] *Idem*, art 167.

[128] *Idem*, art 168.

[129] See para 6.3.2 above in this regard.

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

Liability actions

The directors of a company in financial difficulty continue to owe the general companies law fiduciary duties, including the duty of loyalty, which embraces the obligation to act with the correctness of an honest person and in the best interests of the debtor. Further, the duty of diligence imposes the obligation to perform their responsibilities with the diligence of a good businessman. The good businessman standard requires that the directors have minimum qualifications and that they perform their responsibilities in accordance with such qualifications, including during the investigation and due diligence required to adopt any decision.

When the debtor becomes financially distressed, however, the directors will be required to adopt any available measures to overcome the financial difficulties or reduce the losses (including the filing for reorganisation, the negotiation of an out-of-court restructuring agreement, or even the petition for bankruptcy). Even if the Bankruptcy Law does not oblige the directors to file for bankruptcy or reorganisation, the directors may be subject to liability if the failure to file for reorganisation or bankruptcy, or the delay of such filing, finally aggravated the financial situation of the debtor.

The directors must avoid any actions in fraud of the creditors' rights and engaging in any deceitful or negligent action affecting the creditors' rights.

The following third parties be held liable for any damages arising from the debtor's bankruptcy:[131]

(i) the members of the board of directors and representatives that wilfully provoked, facilitated, allowed or aggravated the debtor's economic and financial situation or its insolvency; and

(ii) any third party, including the shareholders, who wilfully participated in acts leading to the depletion of the debtor's assets or to an undue increase in the debtor's liabilities (known as an exaggeration of the debtor's liabilities), before or after the adjudication of bankruptcy.

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

In accordance with article 1724 of the Civil and Commercial Code it may be possible to hold third parties liable if they should have known the consequences of their acts or omissions, even though they had no effective knowledge or wilful intent. This liability also applies to acts that may have been carried out up to one year before the insolvency date.[132]

[131] ABL, art 173.
[132] *Idem*, art 174.

The liability must be declared and determined in an ordinary judicial proceeding. The liability action may be brought by the trustee and must be initiated by the trustee if creditors representing a majority in amount of unsecured claims, acknowledged and declared admissible, authorise the trustee to bring the action. The Bankruptcy Law only allows creditors to bring an action when the trustee fails to initiate the liability action.

This action becomes statute-barred after two years from the date of the bankruptcy award.

If the liability action is filed against third parties, the plaintiff must prove that the defendant had participated in acts intentionally aimed at the reduction of the debtor's assets or the exaggeration of its debts, either before or after the declaration of bankruptcy; and the defendant must turn over any assets still in its possession and compensate for any damages caused by its behaviour. In addition, a defendant that is found liable cannot assert any rights in the debtor's bankruptcy proceeding.

The bankruptcy trustee can also sue the shareholders of the bankrupt company if they have caused or contributed to the insolvency of the company.[133] This is not applicable if, in its relationship with the bankrupt entity, the shareholder exercised its legal rights as a third party in arm's-length conditions. Furthermore, the Bankruptcy Law does not prevent the filing of a claim against directors and shareholders under the Companies Law. These claims must be filed by the trustee, and it is debatable whether he must be previously authorised by the creditors to do so.

6.3.8 Conclusion of bankruptcy

There are different ways to terminate bankruptcy proceedings:

- When the debtor has obtained the unanimous consent of all creditors to terminate the bankruptcy proceedings (also known as "acceptance");[134]

- Total payment of claims by means of receipts of all admitted creditors, duly authenticated. If the debtor is not able to agree with one or more of the creditors, it has the right to guarantee or deposit with the court the amount due to those creditors in order to lift the bankruptcy proceedings. The bankrupt must also pay the total expenses of the insolvency proceedings;[135]

- Termination of the bankruptcy procedure through final distribution of proceeds. After the sale of all assets at either auction, bidding, privately, or otherwise in a manner designed to achieve the maximum amount to be distributed to creditors have been completed, the bankruptcy proceedings conclude. Nevertheless, the court resolves the closure of the proceedings. The resolution does not preclude the effects of bankruptcy and the proceedings may be reopened when it becomes known that there are assets subject to dispossession.[136] Once two years have elapsed from the date of the resolution ordering

[133] *Idem*, art 175.
[134] *Idem*, arts 225 *et seq*.
[135] *Idem*, art 229.
[136] *Idem*, art 230(1).

termination of the proceedings without it being reopened, the court may order the conclusion of the insolvency proceedings;

- Full payment when assets are sufficient to pay all acknowledged creditors and the final distribution statement is approved; and

- Termination of the bankruptcy procedure due to a total absence of assets to be liquidated. In those cases where 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.[137] The Bankruptcy Law presumes the existence of fraud and the commercial judge will request the intervention of a criminal court for further investigation.

6.3.9 Conversion

After bankruptcy is adjudicated and within the 10 days after the publication of the bankruptcy adjudication notices, the debtor may file a motion requesting the conversion of the bankruptcy proceedings into reorganisation (if it complies with the requirements of articles 90 and 93 of the Bankruptcy Law), provided that the bankruptcy was not adjudicated as a consequence of the breach of a reorganisation plan; or while reorganisation proceedings were pending; or if one year has elapsed since a court declaration of performance of a prior reorganisation.

6.3.10 Special Insolvency Proceedings

Companies involved in certain activities, such as banks and insurance companies, must follow special insolvency proceedings in the event of a restructuring or liquidation.

Financial institutions may not apply for a reorganisation proceeding or file a petition for its own bankruptcy under the Bankruptcy Law, and may not be adjudicated bankrupt until the Argentine Central Bank revokes its licence first. When a financial institution is insolvent or has liquidity problems, the Argentine Central Bank may authorise the financial institutions' restructuring through different alternatives, including the exclusion, transfer and assignment of assets and liabilities (which remarkably, has been the option adopted in all cases) prior to revoking the financial institution's licence.

Of the different special insolvency proceedings existing, the proceeding provided for by article 35 *bis* of the Financial Institutions Law is worth mentioning. Under this proceeding, the Argentine Central Bank authorises the exclusion and transfer of privileged assets and liabilities to a trust. The credits of depositors and the Argentine Central Bank are included in the list of privileged creditors who have guarantees of the trust assets. The remaining creditors are required to verify their credits before the bankruptcy court which would liquidate the remaining assets that were not transferred to the trust.

The main features of this option may be summarised as follows: deposits are excluded from the distressed financial institution and transferred to another financial institution. Further, all or

[137] *Idem*, art 232.

almost all of the assets of the distressed financial institution are transferred in trust to a trustee who in turn, issues a: (i) senior certificate of participation in an amount equal to the excluded deposits which is delivered to the financial institution assuming the excluded deposits, and (ii) subordinated certificate of participation in an amount equal to all the assets it holds less the amount of the senior certificate of participation, which is delivered to the distressed financial institution. The assets of the trust are realised by the trustee, and most of the distressed financial institution's employees are rehired by the financial institution that assumed the deposits, which is also allowed to open branches in the same locations as the distressed financial institution.

If the restructuring fails, the Argentine Central Bank may revoke the financial institution's licence and, unless the revocation resolution includes the order to file a petition for bankruptcy or the institution's creditors file a petition for bankruptcy after 60 days from the revocation resolution, the financial institution will be subject to a judicial liquidation procedure.

6.3.11 Voluntary dissolution and winding-up

In accordance with Argentina's Companies Law, a company may also voluntarily resolve to dissolve and wind-up its business.[138] The aim of the winding-up process is to liquidate the company's assets, settle its liabilities and distribute any balance to shareholders in proportion to their paid-up capital.

After the dissolution agreement the company may only attend to urgent matters and shall adopt the measures necessary to start liquidation. Any operation against these purposes makes administrators jointly and severally liable against third parties and partners, notwithstanding their liability.

The liquidation of the company is performed by the administrative body, except for special cases or when provided for otherwise.

Companies in the process of winding-up may also file a petition for the institution of voluntary insolvency proceedings.[139]

Self-Assessment Exercise 4

Question 1

With reference to each of the statements below: indicate whether it is true or false, and if false, provide a reason for your answer:

(a) A secured creditor can avoid filing proof of the claim and request the realisation of the collateral at any time as long as such creditor files the proceeding before the bankruptcy court.

[138] Companies Law, art 94 *et seq*.
[139] ABL, art 5. Also see the discussion in para 6.1.1 above.

(b) Directors that resigned from their position before bankruptcy was declared are not subject to disqualification.

(c) The counterparty of an uncompleted agreement with the debtor is free to terminate the agreement in case of the debtor's bankruptcy.

(d) Bankruptcy liability in accordance with articles 173/4 of the Bankruptcy Law only applies to acts that took place during the clawback period.

(e) The court's decision on bankruptcy extension does not require the individual or corporation to which the bankruptcy shall be extended to be in cessation of payments.

Question 2

Name one liquidating and one non-liquidating way to terminate the bankruptcy proceedings.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.4 Receivership

There is no system of receivership in Argentinian insolvency proceedings.

6.5 Corporate rescue

6.5.1 Out-of-court restructuring

The debtor and its creditors may reach an agreement and execute an out-of-court workout (*Acuerdo Preventivo Extrajudicial* or APE) and file it in court to obtain the creditors' approval.[140] This is similar to pre-packaged bankruptcies under the Bankruptcy Code of the United States (US Bankruptcy Code).

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

The unsecured creditors may be classified in different classes with different restructuring proposals. This out-of-court reorganisation agreement may be executed by means of a private instrument, with the signature of the parties and the representations invoked, duly certified by a notary public.

[140] *Idem*, *arts* 69 to 76.

To request court approval and make the out-of-court agreement enforceable against all the creditors, the agreement must be executed by a majority of creditors within each class as follows: (i) the absolute majority (more than 50%) of all unsecured creditors, determined on a head-count basis, and (ii) at least two-thirds of the aggregate principal amount of such unsecured debts. Unsecured creditors that are also controlling shareholders of the company are not taken into account when determining the number of creditors required to consent to the APE or the amount of outstanding unsecured debts of the company.

The consent of unsecured creditors holding debt securities issued in series (that is, notes) must be granted at a shareholder meeting for each series duly called and convened with the required minimum quorum (at least 60% or 30% of the aggregate principal amount of the applicable series in first or second call, respectively). Shareholder meetings are subject to the following rules: (i) for determining a headcount majority, all votes of each series consenting to the plan will be computed as given by one person and all votes rejecting the plan will be computed as given by one person, and (ii) the aggregate principal amount of the security held by the holders consenting to the plan will be computed for determining the principal amount majority, provided that court precedents widely followed have construed that for purposes of calculating the principal majority within in each series the principal amount of the notes not appearing at the meeting or otherwise not voted will not be computed.

The out-of-court agreement is to be filed with the competent court along with a set of documents, including an updated statement of assets and liabilities appraised as at the date of the agreement, duly sworn by a certified public accountant; a list of creditors and the value of their claims; co-debtors; guarantors or third parties liable as regards these claims; a list of judicial and administrative proceedings of economic nature pending or with an unenforced final judgment; the amount of capital represented by the unsecured creditors who have signed the agreements, and the percentage this represents with respect to the total registered creditors of the debtor; and an enumeration of the debtor's commercial and other corporate books.

The petitioner must show that the company is suffering general economic or financial difficulties. Such difficulties are not necessarily required to represent cessation of payments.

On filing the petition for endorsement of the agreement and a preliminary verification of the admission requirements, the court orders the publication of notices informing the admission of the case for five days in legal publications of the jurisdiction of the court, and in one local newspaper of widespread distribution.

Within 10 days of the last publication of the legal notices, the creditors who have not signed the agreement (either declared by the petitioner or who legally evidenced that they had been omitted from the list provided by the petitioner) may oppose its approval by the court, but only on the grounds of omission or exaggeration of the debtor's assets or liabilities, or if the required majority was not met.

The debtor must be given notice of such opposition in order to address the creditors' arguments. If necessary, there shall be a ten-day term for filing evidence, after which the court has 10 days to issue a decision on the admissibility of the opposition.

If there are no objections to the out-of-court agreement, or when the objections have been dismissed by the court, and the required formalities are met (the court should not conduct a substantive review of the APE proposal), the court may approve the out-of-court agreement.

If the court does not confirm the plan, the debtor will not be declared bankrupt.

The effects of the restructuring agreement that undergoes an APE procedure can be divided into three different stages, namely effects as of: (i) execution of the agreement, (ii) filing the APE before the relevant court, and (iii) court approval.

During negotiation of the plan, there is no stay on debt collection. The restructuring agreement becomes binding on the signatory parties as of the execution date, and shall be effective among them in accordance with its terms. In practice, restructuring agreements generally provide a series of conditions precedent that must be complied with prior to effectiveness, including a minimum threshold of consenting creditors that must consent to the agreement.

Filing of the APE before the relevant court, provided that the required majorities have been met and other requirements of the Bankruptcy Law have been complied with, shall, amongst others, have the following main features and effects:

(i) there is no trustee or judicial control of the restructuring process, except for the verification of the required majority and court endorsement;

(ii) there is no submission of proofs of claims;

(iii) there are no restrictions on the debtor's management and disposition powers;

(iv) the publication of the notice triggers a stay of all claims against the debtor other than the claims of secured creditors seeking foreclosure of the collateral under their secured claims, among other limited exceptions;

(v) the commencement of similar actions against the debtor are prohibited; and

(vi) there is no suspension of interest accrual on unsecured claims.

Once it has been approved, the out-of-court agreement and the actions taken, or documents executed, in compliance with the agreement may be validly enforced on any unsecured creditor (even on a creditor who has not signed the agreement and has not participated in its formulation) and on those secured creditors who were party to the agreement.

When the plan has been completely fulfilled by the debtor, the court must issue a declaration of fulfilment of the plan.

The APE has certain similarities compared to the restructuring proceeding. Both procedures (i) result in a restructuring plan becoming enforceable against all unsecured creditors upon court approval, (ii) need essentially the same required majorities to be approved, and (iii) result in a

stay of all claims of unsecured creditors against the debtor as of judicial filing. However, amongst other differences, (i) the judicial filing of a restructuring proceeding suspends accrual of interest, while the filing of an APE does not, (ii) APE proceedings are faster and cheaper, (iii) in a restructuring proceeding a trustee needs to be appointed, creditors need to undergo a proof of claim procedure, and certain acts of the debtor require prior approval of the court, while none of this occurs in an APE, and (iv) the APE produces a less negative impact on the debtor's image.

In re Board of Directors of Multicanal SA the question arose whether an Argentian APE may seek judicial recognition through the ancillary relief set forth in Chapter 15 of the US Bankruptcy Code (formerly section 304). The problem was solved by the US Bankruptcy Court for the Southern District of New York.[141] In that case, ARC (a Delaware creditor) resorted to the Bankruptcy Court alleging that the APE presented by Multicanal SA before an Argentine court violated its rights. Multicanal SA responded by filing a petition under section 304 of Chapter 11 of the US Bankruptcy Code seeking the stay of any actions initiated by the claimant. The Bankruptcy Court rejected ARC's demands. Some months later, the Bankruptcy Court recognised the Argentinian court-endorsed APE. Similar decisions have been adopted by United States courts in *Telecom Argentina SA*[142] and *Cablevisión SA*.[143]

6.5.2 Restructuring proceedings

6.5.2.1 General considerations.

The restructuring or reorganisation procedure is a judicial insolvency proceeding initiated to restructure the debtor's outstanding debts, and is similar to the Chapter 11 proceedings under the US Bankruptcy Code.

Only a debtor can petition for a reorganisation proceeding either by the filing of a petition for:

- reorganisation directly at any time before bankruptcy adjudication, provided that it is in payment cessation and at least one year has elapsed since a declaration of performance of any prior reorganisation plan filed by the debtor; or

- the conversion of a liquidation proceeding into a reorganisation proceeding after bankruptcy adjudication.

The petition for reorganisation is deemed sufficient evidence of the debtor's confession to a cessation of payments.

[141] *In re Argentinian Recovery Co. v. Bd. of Dirs. of Multicanal SA*, 331 B.R. 537, 540 (SDNY 2005).
[142] *In re Bd. of Dirs. of Telecom Argentina SA*, 2006 WL 686867 at 2 (Bankr SDNY February 24, 2006).
[143] *In re Cablevisión SA*, Case No. 04-15697 (SMB) (Bankr SDNY October 23, 2009). For further information on this subject please see the paper available at https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-8-winter-2018_2019/cross1-pdf.pdf.

Corporations must file for reorganisation through their legal representatives. This resolution from the board of directors should be ratified by a shareholders' meeting within 30 days of filing.[144]

Along with the petition for reorganisation, the debtor must submit, amongst others, the following before the court:[145]

- corporate by-laws and records and evidence of its registration in the Public Registry;
- a comprehensive explanation of its current net worth / equity status, date of suspension of payments and the facts that led to such suspension;
- an updated statement detailing and assessing the assets and liabilities, with a precise indication of their composition, the rules used to ascertain their current valuation, the location, condition and liens over such assets, and other necessary information to enable an accurate assessment. This statement should be annexed to a report made by a certified public accountant;
- copies of the debtor's financial statements, including balance sheets and other accounting statements requested by law for the previous three fiscal years, along with the reports from both the board of directors and the supervisory committee;
- a list of the existing creditors, specifying: their domiciles, the value of their claims, their cause, maturity dates, co-debtors, guarantors or third parties liable or responsible, and the priority of the claims. An additional file for each creditor, along with a copy of the documents supporting the claim, and a report from a certified public accountant on the financial statements of the company and its accounting entries, books and documentation, must be annexed to the filing, along with details of all existing judicial or administrative proceedings indicating the court with jurisdiction over them. The report from the certified public accountant must expressly indicate whether there are any other labour claims that are unpaid;
- an enumeration of the debtor's commercial and other corporate books;
- a statement indicating the debtor's employees with relevant information for purposes of identifying them, and an accounting certification of any potential debt to social security institutions; and
- a declaration that it has not filed a reorganisation petition within a one-year period or that it has not withdrawn from an open proceeding during that same period.

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

[144] ABL, art 6.
[145] *Idem*, art 11.

Upon the commencement of the restructuring proceeding, the court will appoint a trustee who will be responsible for reviewing and advising the court regarding the debtor's proposed plan, disputed claims, and all other matters relating to creditors' rights. The court shall also appoint a provisional committee amongst the three creditors with largest claims as set forth by the debtor (unless the proceeding qualifies as a small reorganization).[146] The purpose of this committee is to act as information agent and provide advice. The final creditors committee is the overseer required at the stage of performance of the approved plan.

All requirements established in articles 1, 2, 3, 6 and 11 of the Bankruptcy Law must be met by the debtor before the court can declare the commencement of the reorganisation proceeding. Based on a preliminary analysis of the documentation filed, the court should decide, within five days of the filing, whether to reject or sustain the petition.[147]

The court's resolution sustaining the petition and initiating the reorganisation must set forth, amongst others, the following orders:[148]

- a declaration that insolvency proceedings are instituted, stating the name of the debtor and if applicable, the names of its unlimited liability partners;
- the date of the hearing to appoint a reorganisation trustee (*síndico*);
- a deadline for creditors to file their proofs of claim at the trustee's office;
- an order to publish legal notices in the corresponding newspapers;
- a deadline for the debtor to file all commercial books of the company with the court;
- an order to register the opening of the proceedings with the corresponding public registry;
- a temporary restraining order against buying, selling or creating encumbrances on the assets of the company;
- an order to deposit the proceeding's costs within three days from declaration of commencement;
- the dates on which the reorganisation trustee must submit his report on the proofs of claims (individual report) and a general report describing the company's financial condition;
- the appointment of an informative hearing, which shall be notified with special formalities to the debtor's employees;

[146] See the discussion in para 6.1.3 above.
[147] ABL, art 13.
[148] *Idem*, art 14.

- the appointment of a provisional creditors' committee, which shall include one representative from the debtor's employees;

- a ten-day term for the trustee to report on the debtor's employees and labour debts (including debts than the ones declared by the petitioner when filing); and

- an order for the trustee to file a report providing information about the ongoing business and the availability of liquid funds on a monthly basis.

6.5.2.2. Procedure[149]

After the filing and the court's ruling initiating the reorganisation, the proceedings continue as set out below. The court resolution initiating the reorganisation is published for five consecutive days in the Official Gazette and in another major newspaper local to the place of business of the company.[150]

Proof of claims, trustee's reports and classification and grouping of creditors

Unsecured creditors whose claims originated prior to the filing for reorganisation have a certain period of time within which they must prove or verify their claims to the trustee[151] or the judge.[152] The following needs to accompany the proof of claims supporting the existence and legitimacy of their claims:[153]

(i) information as to the total amount, grounds and preferences of each claim;

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

(iii) a petition in writing and in duplicate, attaching original instruments evidencing the claim and two signed copies thereof. The trustee shall return the original instruments;

(iv) the domicile established with respect to the action set out in the petition;

(v) an affidavit from a foreign attorney stating that the law of the foreign jurisdiction does not discriminate against Argentine creditors whose claims are payable in the foreign country;[154] and

[149] For a useful timeline of the reorganisation proceedings please see https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-8-winter-2018_2019/cross1-pdf.pdf.
[150] ABL, arts 27 and 28.
[151] *Idem*, art 14 sets out the deadline in this regard.
[152] *Idem*, art 32 sets out the deadline in this regard. The request for late acknowledgement must be processed by means of ancillary proceedings within two years from the filing of the petition for insolvency proceedings.
[153] *Ibid*.
[154] *Idem,* art 4.

(vi) a legal fee – equal to 10% of the minimum official labour wage which is periodically adjusted – to be paid by each creditor to the reorganisation trustee for costs and expenses. This amount is added to the claim.

If a special trustee represents bondholders, the Bankruptcy Law allows the bondholders' trustee to submit the proof of claims on behalf of its noteholders / bondholders in order to be admitted by the court as a creditor.[155]

Those creditors that do not file their proofs of claim on time may file a late petition within two years of the date of filing the petition for reorganisation. In such cases, the creditor will most likely be ordered to pay the fees of the reorganisation trustee's attorney.[156]

Once the proofs of claim have been filed, they may be objected to by the company and / or any creditor within 10 days from the deadline to file the proofs of claim.[157]

On or before the date fixed by the court in its opening order, the reorganisation trustee should file the individual claims report advising the court to either accept or reject each of those claims in accordance with article 35 of the Bankruptcy Law. In order to prepare the report, the reorganisation trustee is authorised to analyse the company's accounting books (and, in certain cases, the creditors' books) and furnish himself with all the information that he may consider useful to determine the validity of the claims. The trustee may require additional information from creditors as provided for in article 33 of the Bankruptcy Law.

Final acceptance of the claims is subject to the court's decision. Hence, the verification process is complete upon the entry of a judicial ruling which verifies the claim, or which alternatively finds that the claim is admissible or inadmissible.[158] The creditors or the company may challenge the decision within 20 days from its issuance through a special reconsideration proceeding.[159]

Only creditors with verified or admissible claims by judicial ruling (whether they are subject or not to review) are the only creditors whose claims will be taken into consideration for voting purposes in connection with a plan of reorganisation.

Creditors with claims secured by a lien, pledge or any other security interest whose claim originated before the filing for reorganisation must also file a petition for the admission of their claims in the same manner as the unsecured creditors. However, secured creditors may continue the process of enforcement of the security and once admitted, request and order the sale of the collateral by public auction.[160]

The reorganisation trustee should also file the general report in accordance with article 39 of the Bankruptcy Law, which must contain:

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[155] *Idem*, art 32 *bis*.
[156] *Idem*, art 56.
[157] *Idem*, art 34.
[158] *Idem*, art 36.
[159] *Idem,* art 37.
[160] *Idem*, art 21.

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

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

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

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

(v) the date from which payments were no longer honoured (that is, the date of suspension of payments);

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

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

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

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

(x) a duly grounded opinion as to the grouping and classification made by the debtor with respect to the creditors.

Within 10 days after the submission of the report the debtor and any parties who have requested proof of claims may file objections to the report. These shall be attached to the record of the case without further processing and shall remain available to interested parties for consultation.[161]

Once the court rules on the admission of the claims, the company may file a proposal to classify and group the admitted creditors into categories, based upon the value of their claims; the existence of security interests; the nature and cause of the claims; or any other reasonable and relevant factor in order to offer them differing restructuring proposals.[162]

This categorisation proposal must set out at least three categories, namely: unsecured creditors, unsecured labour creditors and secured creditors.

Once the trustee files the general report the court shall rule on the classification of the creditors, approving or modifying the proposal filed by the company. The court in its decision should also

[161] *Idem*, art 40.
[162] *Idem*, art 41.

appoint the new members of the provisional creditors' committee, which must include the main creditor within each category.[163]

Reorganisation plan[164]

The debtor enjoys a non-compete or exclusivity period of 90 business days, extendable by up to 30 additional business days, from the date on which the court's resolution admitting the debtor's proposed classification of creditors (the exclusivity period). During this time, the debtor must create a reorganisation plan for each class of unsecured creditors and obtain the consent of the required majorities of the creditors within each category.

The plan of the debtor shall contain equal terms for creditors within each class of creditors, but differing terms can be contained in plans for creditors of different classes. Alternative proposals can also be admitted, but each creditor shall exercise its option at the time of its individual acceptance of the plan.

Restructuring plans may include any variety of all available payment alternatives (including debt-for-debt, debt-for-equity or debt-for-cash proposals – or any combination) provided that the plan is subject to the following minimum requirements: (i) the plan must not discriminate between opposing classes by banning such creditors from choosing amongst the available payment alternatives or allocating to such creditors consideration of inferior value, (ii) the payment received under the plan by the opposing classes must not be less than the dividend such creditors would receive in the liquidation, and (iii) the plan must not be abusive towards creditors' rights.

The reorganisation plan should also include: (i) an administration regime and restrictions on any disposition of assets, both applicable during the fulfilment period of the reorganisation plan, and (ii) the selection of the final creditors' committee, which will control the performance of the reorganisation plan (and which will replace the provisional creditors' committee).

The debtor must file the content of the reorganisation plan in court within 20 business days before the expiration of the exclusivity period. If the debtor fails to do so it shall be declared bankrupt, except in the special cases set forth in article 48 of the Bankruptcy Law (being salvage proceedings).

The company should file the written and certified (by a judicial or administrative notary) approvals of the unsecured creditors whose claims were admitted by the court to the reorganisation before the expiration of the exclusivity period.

Normally the plan is carried out solely with the unsecured creditors but if contemplated in the plan, secured creditors with special preferences[165] shall give a unanimous vote.[166] On the

[163] *Idem,* art 42.
[164] *Idem*, arts 43 *et seq*.
[165] See the discussion in para 6.3.6 above in this regard.
[166] ABL, art 44.

contrary, if contemplated in the plan secured creditors with general preferences shall be ruled by the same majority required for unsecured creditors.
The majority applicable then for both unsecured and secured creditors with general preference is an absolute majority of creditors within each and every category (headcount majority of more than 50% of heads) representing two-thirds of the computable capital within each category.[167]

Articles 32 *bis* and 45 *bis* of the Bankruptcy Law establish rules allowing claims-verification of bondholders and permitting them to vote on restructuring plans. A special provision limits the voting rights of insiders. The headcount and principal majorities at the meeting are computed as follows: in respect of the headcount, all votes of the holders supporting the plan are computed as given by one person and all votes opposing the plan are computed as given by one person; and in respect of the principal amount, following broadly accepted case law, the principal amount of the securities held by the holders not attending the noteholders' meeting or abstaining from voting at the meeting are not computed in the calculation of the principal majority.

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

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

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

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

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

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

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

Should the company obtain the legal majorities in each category, the court will declare the existence of a reorganisation plan in accordance with article 49 of the Bankruptcy Law. In between the court's ruling that declares the existence of the reorganisation plan and the court's ruling that approves the reorganisation plan,[168] any creditor has the right to object to the plan based on: (i) mistakes in the consideration of the legal majorities, (ii) insufficient representation

[167] *Idem*, art 45 provides how the majority of the capital in each category shall be computed and which creditors are excluded from this calculation.
[168] *Idem*, art 52.

of the creditors, (iii) fraudulent increase of the company's liabilities, (iv) fraudulent increase or decrease of the company's assets, and (v) a failure to comply with formal requirements.[169] Once the objection has been processed and should the court consider it admissible, it shall issue the related resolution ordering the adjudication of bankruptcy.

The Bankruptcy Law provides that if at the end of the exclusivity period the debtor obtains the required majorities without objections, or where objections are made they are disregarded by the court, the court shall approve the reorganisation plan and elect a creditors' committee in charge of controlling the performance thereof.

The judge may not approve a plan accepted by the required majorities (even if nobody challenged the plan) if he considers its content to be abusive or contrary to law.[170]

When a proposal does not obtain the required majorities from all classes of creditors, the court may nevertheless approve the proposal and confirm the plan if the plan was approved by both: (i) the required majorities within at least one of the impaired classes of unsecured creditors, (ii) unsecured creditors representing at least three-quarters of the aggregate principal amount of unsecured credits, (iii) the court considers that the proposal is fair and that it does not unreasonably discriminate against any dissenting class of creditors, and (iv) payments to be made pursuant to the reorganisation plan are not lower than what would have been received by the creditors who rejected the proposal had the debtor been in bankruptcy (this is known as the cram-down power in terms of article 52(2)(b) of the Bankruptcy Law).

The approved reorganisation plan is binding on every unsecured creditor whose claim originated before the filing for reorganisation, whether it has participated in the reorganisation proceedings or not.

The main consequence of the approved plan is that all obligations that existed before the opening of the reorganisation proceeding shall be novated.[171] The important significance of this rule is that the amounts of the debt will be reduced in all aspects, including the case of liquidation on default of the terms of the plan. This novation does not extinguish the obligations of guarantors nor of joint and several co-debtors.

The effects of the clauses involving secured creditors shall only apply if the reorganisation plan is approved. Secured creditors with general preferences or with special preferences (but not *in rem*) that are not included within the scope of the agreement may enforce the judicial decision approving proof of their claims before the relevant court in accordance with the nature of their claims. They may also request that the debtor be adjudged bankrupt in accordance with the provisions of article 80(2) of the Bankruptcy Law.[172]

[169] *Idem*, art 50.
[170] *Idem*, art 52(3).
[171] *Idem*, arts 55 and 56.
[172] *Idem*, art 57.

Salvage proceedings or cramdown[173]

When the debtor is a corporation, a limited liability company, a co-operative or a company partially owned by the federal, provincial or municipal government and if upon the exclusivity period expiring it has not reached the majorities required for the reorganisation plan, bankruptcy is not declared *ipso facto*. This is in order to allow any creditor or a third party and / or a *Cooperativa de Trabajo* (workers' co-operative formed by employees of the debtor) interested in the purchase of the company to submit their own proposal based on their interest in taking over the company (the interested third parties). The debtor may also participate in this second instance, making new proposals or resubmitting the previous reorganisation proposals in order to compete with the salvage creditors, interested third parties or *Cooperativa de Trabajo*. In turn, the debtor, salvage creditors, the interested third parties or a *Cooperativa de Trabajo* will have to obtain the creditors' approval to their proposals by a majority vote of creditors within each and every category representing two-thirds of the total indebtedness in each category. If such salvage proceeding fails, bankruptcy shall then be declared by the court.

The Bankruptcy Law allows the interested third parties to bid for the company while, at the same time, the debtor is given another opportunity to negotiate with its creditors, although with no preference over the interested third parties.

The proceedings set forth by the Bankruptcy Law for this optional buy-out plan are governed by the following general terms and conditions:

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

(b) the interested third parties should negotiate with the creditors and obtain their approval of the plan filed by the interested third parties to cancel the debtor's liabilities admitted by the court. The first interested third party to secure the required creditors' approval must inform the court thereof. Should the plan be approved by the court, if the first person to obtain the required majorities is the debtor, the proposed plan is approved following the same procedure as in restructuring proceedings. If the required majorities are obtained by another person, the interested third party is entitled to acquire the company's stock at a price to be determined as follows:

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

[173] *Idem*, arts 48 and 48 *bis*.

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

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

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

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

If none of the interested third parties and / or the debtor obtains the required creditors' approvals, or the court does not endorse the approved plan, then the court will declare bankruptcy.

Control and finalisation of the reorganisation proceedings

In accordance with article 59 of the Bankruptcy Law, the court shall declare the reorganisation proceedings to have been concluded once: (i) the reorganisation plan is approved by the court, (ii) all measures aimed at the fulfilment of the obligations in the reorganisation plan are taken, (iii) the pertinent guarantees are granted; and (iv) the general injunction forbidding the disposal of assets that applied during the reorganisation process is reinforced by the court (unless the creditors expressly agree to remove such preliminary injunction). Once the proceedings are concluded, the duties of the trustee end.

Furthermore, when the plan has been completely fulfilled by the debtor, the court must issue a declaration of fulfilment of the plan at the debtor's request and after notice to the controllers in charge of monitoring its fulfilment. The debtor cannot submit a new petition for a reorganisation proceeding until one year has elapsed from the date of the judicial declaration of fulfilment, nor may the debtor convert the adjudication of bankruptcy into reorganisation proceedings.[174]

[174] *Idem*, art 59.

6.5.2.3 Effects of filing for reorganisation

The initiation of the reorganisation proceedings results in the following:

(a) Once the reorganisation proceedings start, the debtor stays in possession of its assets but its administration is subject to the supervision of the trustee.[175] Nonetheless, the debtor must obtain court approval (with prior notice to the trustee and the creditors' committee) before engaging in most activities deemed to exceed the ordinary course of business, as well as certain material transactions, including transactions on registered property; creation of liens; disposition or lease of goodwill; issuance of secured debt; and granting of pledges. The authorisation procedure involves giving prior notice to the trustee and creditors' committee and the court shall assess the advisability thereof *vis-à-vis* the continuation of the insolvent's activities and the protection of the creditor's interests.[176]

In addition, the debtor is forbidden from entering into transactions for no consideration or which would adversely affect the status of pre-petition claims.[177]

The court can separate the debtor's management and appoint replacement management in any of the following cases:

- if any of the above rules are violated;
- a failure to disclose information requested by the court or the trustee or the supply of any false information; or
- performance of any acts to the creditors' evident detriment.

Nevertheless, in some circumstances the court may instead decide to limit the administration of the company by appointing a co-administrator or a controller, rather than allocating a replacement for the management.[178]

(b) The suspension of interest accruing on pre-petition claims, except for claims secured by a pledge or a mortgage and certain labour claims (salaries and compensation). Interest accruing after the filing can only be collected from an amount obtained from the foreclosure of collateral.[179]

Non-monetary debts are converted for all purposes of the proceedings into legal tender. Debts in foreign currency are calculated in legal tender as of the date of the filing of the trustee's report referred to in article 35 of the Bankruptcy Law, solely for the purpose of calculating liabilities and majorities.[180]

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[175] *Idem*, art 15.
[176] *Idem*, art 16.
[177] *Ibid*.
[178] *Idem*, art 17.
[179] *Idem*, art 19.
[180] *Ibid*.

(c) All the proceedings in connection with pre-petition unsecured monetary claims against the debtor (with certain limited exceptions) are automatically stayed and the venue of all such proceedings are consolidated at the court hearing for the reorganisation proceedings. New claims based on those reasons or titles are not allowed to be filed.[181]

The automatic stay does not apply to lawsuits in respect of labour matters or those of extensive evidence production both of which may be continued before the courts where they were initially filed, at the creditor's option. The above obligation to suspend litigation proceedings and remit the litigation to the reorganisation court also does not apply to divorce and associated ancillary relief proceedings, actions for expropriation by the government or execution of collaterals and claims where the debtor is a joinder defendant.

If the creditor exercises the option to file or follow one of the lawsuits before the competent courts that are not automatically stayed, it will have the right to request admittance of the claim in the reorganisation within six months after the date on which the ruling on the merits becomes final in the litigation.[182]

Foreclosure proceedings relating to mortgages and pledges may be initiated or continued in the relevant courts with prior notice to the court that is hearing the reorganisation, provided that the secured creditor files proof of such claim with the trustee.

However, in the case of apparent need or urgency the court may order a temporary stay of a mortgage or pledge enforcement action and the effects of a precautionary measure on the collateral for a term of not more than 90 business days.[183]

(d) No precautionary measures are allowed in lawsuits excluded from the jurisdiction of the reorganisation and there is the possibility to request the lifting of any precautionary measures over the debtor's assets, if necessary for it to continue with its ordinary commercial activity.[184]

(e) Statutory managers and officers of the company may not travel abroad without previous notice to the court and for a period of no more than 40 days. Longer periods of travel require special court authorisation.[185]

(f) The Bankruptcy Law has a strong system for labour claims protection, which system was furthered with the entry into force of Law 26.684, which strengthened such protection in the so-called "early payment" (*pronto pago*). There are two alternatives provided for in article 16 of the Bankruptcy Law. The first is automatic early payment, where the trustee prepares an audit of employee benefits according to the debtor's accounts to be submitted to the court. If certain conditions are met, the judge orders payment of labour claims identified in the report. The second alternative is self-driven, where the employee requests the early

[181] *Idem*, art 21.
[182] *Idem*, art 56.
[183] *Idem*, art 24.
[184] *Idem*, art 21.
[185] *Idem*, art 25.

payment, which is then forwarded to the trustee and the debtor and decided finally by the judge. In both cases, only labour claims with general or special preference acknowledged by court shall be fully paid from the available liquid funds of the debtor company or, in case there are no liquid funds, up to 3% of the debtor's gross monthly income shall be set aside to pay *pro rata* this claims until they are fully paid.

(g) Acts which violate the provisions of article 16 of the Bankruptcy Law are, by operation of law, null and void *vis-à-vis* creditors.[186]

6.5.2.4 General treatment of agreements

If all the obligations of the debtor under an uncompleted contract have been fulfilled as at the date of filing for reorganisation, any obligations emerging from such agreement must be complied with by the debtor's counterparty.

On the other hand, if the counterparty has fully discharged its obligations and at the date of filing for reorganisation there are unfulfilled obligations of the debtor, the counterparty must file a claim for its credit with the trustee.

The company may continue performing its obligations under any existing contract in which mutual obligations are still pending (for example, a license agreement) by securing previous authorisation from the court.[187] The counterparty may request the company to fulfil those obligations that were due and outstanding on the date that the reorganisation was filed. Obligations discharged by a third party after receiving authorisation from the court enjoy the preference set forth in article 240 of the Bankruptcy Law.

Should the counterparty not be given notice of the decision to continue with the contract within 30 days of the commencement of the reorganisation, the counterparty shall then be entitled to terminate the contract.

The supply of public utilities (such as electricity, gas, telephones, etcetera) to the company may not be suspended after the date of the filing on the ground that the debtor failed to pay pre-petition debts. On the contrary supply could be suspended for obligations that originated after the filing for reorganisation.[188]

6.5.2.5. Additional finance

A debtor in a judicial restructuring can obtain additional finance, but in practice it would be difficult without offering some guarantee. This would be a post-application claim not subject to the restructuring plan. In the case of non-payment, the creditor can initiate all ordinary actions

[186] *Idem*, art 17.
[187] *Idem*, art 20.
[188] *Ibid*.

available. In case of liquidation, no special priority of repayment of the additional finance is given.[189]

6.5.2.6 Reorganisation of an economic group

Companies that are part of an economic group may file for reorganisation as a group,[190] provided that they have previously proven the existence of said economic group. The filing for reorganisation must include all of the companies in the group, without exception. The court may reject the filing when the existence of the economic group is not duly evidenced, and such a decision may be appealed.

To file a petition, it is sufficient that a single member is in payments cessation and that the group members may be affected by the insolvency of that single member.

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

(a) A single trustee usually supervises the process and the joint petition group members' assets and business. However, depending on the size of the restructuring and the amount of the indebtedness, the court can appoint more than one trustee, distributing the tasks to be performed by each of them and determining the manner in which they will co-ordinate their duties. A court hearing is required to appoint the trustee and determine whether administration will require more than one trustee;

(b) Secured and unsecured creditors or other parties with an interest in the proceedings can do any of the following:

- object with cause to the appointment of the trustee(s);
- be heard at the hearing appointing the trustee(s); and
- file an objection with cause to the trustee(s) appointed after the hearing.

(c) The hearing is fixed by the court on resolving the commencement of the reorganisation proceedings or the liquidation case. Notice of the hearing is not given through publications or any other means, and creditors can only obtain notice of the hearing date through reviewing the court resolution;

(d) there should be one proceeding for each company;

(e) creditors can challenge the claims submitted in any of the group members' proceedings;

[189] See "Restructuring and insolvency in Argentina: overview" available at https://content.next.westlaw.com/1-5059725?__lrTS=20210619120530857&transitionType=Default&contextData=(sc.Default)&firstPage=true.

[190] ABL, arts 65 *et seq*.

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

(g) the companies in the economic group may file unified proposals of categorisation and proposals of payment considering the liabilities of the economic group as a whole, or they can formulate a single reorganisation plan;

(h) if the plan is under the single formulation regime and is finally not consummated, only the one entity that submitted the defaulted plan will be liquidated; whereas a default under the unified proposals regime will result in the liquidation of all of the members of the group;

(i) the legal majorities to approve such proposals are the same as those for the reorganisation plan.[191] However, the proposals will also be considered duly approved if the economic group obtains approvals from more than 75% of the whole amount of claims accepted in all proceedings of the economic group and more than 50% of the amount of claims in each category; and

(j) any group member or its assignees holding credits within the two years immediately preceding the filing date do not have voting rights.

In a group's reorganisation, the venue is the court of the jurisdiction of the group member with the largest amount of assets according to its last financial statements.

The group reorganisation could also be executed by an out-of-court reorganisation agreement. The decision depends on the financial situation and strategy of each member of the group.

Any member of the corporate group that is adjudicated bankrupt will however only be able to file a petition for the conversion of the bankruptcy adjudication into a reorganisation proceeding. Different members of the corporate group may therefore be subject to an out-of-court restructuring agreement, a reorganisation proceeding and a bankruptcy proceeding.

6.5.2.7. Conversion

Indirect bankruptcy shall take place in any of the following cases:

(a) if for any reason the debtor fails to propose a plan 20 business days before the expiration of the exclusivity period;

(b) failure to obtain majorities before the expiration of the exclusivity period will result in the court declaring bankruptcy, except when the salvage proceedings or cramdown remedy is available;

[191] See para 6.5.2.2 above in this regard.

(c) if the objections filed by a creditor against the resolution that declared the existence of a reorganisation plan succeed, the court should immediately dismiss the reorganisation plan and declare bankruptcy;

(d) where approval of the plan has been procured by fraud, and within six months after its judicial approval it is subject to challenge at the request of any creditor referred to in clauses of the plan. If the fraud is proved, the plan shall be nullified and the debtor shall be liquidated. The request must be based exclusively on the wilful exacerbation of the liabilities, recognition or simulation of inexistent or unlawfully granted securities, concealment or exacerbation of the assets known after the lapse of the statutory term for challenging the plan;[192]

(e) if the terms of the plan are not accomplished, the judge shall order the liquidation of the debtor;[193]

(f) if salvage proceeding fails, bankruptcy shall then be declared by the court; and

(g) if the debtor fails to pay legal fees within 90 business days after the reorganisation plan was endorsed.[194]

Self-Assessment Exercise 5

Question 1

In table format, indicate the relevant articles of the ABL that deal with the following aspects in respect of corporate rescues and bankruptcy proceedings:

- Cessation of payments
- Parties subject to corporate rescues or liquidation proceedings
- Competent court
- Requirements that debtors have to fulfil in order to file for reorganisation or bankruptcy
- Management by the debtor
- Invalid acts
- Automatic stay
- Accrual of interests
- Non-monetary debts
- Proof of claims
- Early payment (on labour claims)
- Trips abroad
- Agreements regulation

[192] ABL, arts 60 to 62.
[193] *Idem*, art 63.
[194] *Idem*, art 54.

- Legal preferences
- Secured creditors rights

Question 2

Write an essay on whether there is a legal obligation to file for corporate rescue in specified circumstances or not, and refer to specific articles of the ABL in support of your argument.

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW[195]

7.1 General background

Argentina has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. Cross-border insolvency cases are therefore governed either by the:

(a) Montevideo Treaty of 1889 that is binding for cross-border insolvencies involving Perú, Colombia, Bolivia, Paraguay, Uruguay and Argentina;

(b) Montevideo Treaty of 1940 that is binding for cross-border insolvencies involving Argentina, Paraguay and Uruguay;[196] or

(c) Bankruptcy Law for cross-border insolvencies with international elements from any other country (articles 2, 3 and 4 ABL).[197]

The Bankruptcy Law sets forth three principles that rule cross-border insolvencies:

(1) The principle of local preference: it is this rule of preference for creditors participating in the Argentine liquidation process that establishes that creditors participating in a foreign insolvency process will only have the right to the balance of the debtor's remaining assets after all the claims of the creditors participating in the Argentine liquidation process have been fully satisfied. This balance includes any remaining money after the Argentine liquidation process is concluded by full payment of the principal amount and interest on

[195] For further insight on the subject see "Rules of international private law, priorities on insolvency and the competing rights of foreign and domestic creditors, under the Argentine insolvency law" available at https://www.iiiglobal.org/sites/default/files/13-_RULES%20OF%20INTERNATIONAL%20PRIVATE%20LAW.pdf; and "Insolvency and directors' duties in Argentina: overview" available at https://uk.practicallaw.thomsonreuters.com/Cosi/SignOn?redirectTo=%2f3-606-0185%3ftransitionType%3dDefault%26contextData%3d(sc.Default)%26firstPage%3dtrue.

[196] The Montevideo Treaties of 1889 and 1940 do not unify the insolvency laws of the countries that are parties thereto. These treaties provide for the unification of numerous rules of international private insolvency law.

[197] ABL, arts 2 to 4.

all claims submitted under the Argentine liquidation process, and after full payment of all legal fees and court costs and expenses relating to the liquidation process.

(2) The principle of reciprocity: in terms of this principle, participation in an Argentine liquidation case by creditors holding claims payable outside of Argentina and not participating in a foreign insolvency process is conditioned on filing evidence that reciprocally shows creditors holding claims payable in Argentina are permitted to participate in an insolvency proceeding commenced in the jurisdiction where such claims are payable in equal conditions with the domestic creditors of such jurisdiction. An exception is made for creditors holding claims secured by liens on property (*in rem* guarantees such as mortgages).

The condition for any creditor to be subject to the reciprocity requirement is based on the place of payment of the claim (outside of Argentina) and not on the nationality or domicile of the creditor.

(3) The principle of dividend parity: in terms of this principle, payments received by unsecured creditors in a foreign liquidation process will be computed on account of the general distribution available to such creditors under the Argentine liquidation process.

Under the Argentine rules of conflict of laws for cross-border insolvencies, the differences between restructuring and liquidation proceedings must be taken into account. In fact, the principle of local preference, which subordinates the credit payable abroad belonging to foreign bankruptcy proceedings, only applies in liquidation cases.

Except for the Montevideo Treaty of 1889 and the Montevideo Treaty of 1940 (the Montevideo Treaties),[198] Argentina has adopted the principle of territoriality or plurality and does not recognise foreign insolvency proceedings nor any mechanism or ancillary case to aid foreign creditors or bankruptcy trustees to obtain the turnover of the foreign residents' property within Argentina. A separate insolvency proceeding must be commenced in Argentina in connection with the foreign debtor's assets in Argentina.

The Argentine courts limit their jurisdiction to the debtor's assets located in Argentina.

7.2 The Montevideo Treaties

Under the Montevideo Treaties the following rules are applicable to all judicial liquidations, reorganisations, payments suspension and other similar proceedings:

(1) The following courts are competent to hear insolvency cases:

- the court of the jurisdiction of the domicile of the debtor (even if it carries on business in other member states or through agencies or branches acting on behalf of the main centre

[198] Both 1889 and 1940 Treaties were a step towards the possibility, although limited, of a single bankruptcy proceeding; as well as the co-operation and recognition of certain effects of proceedings in one country over assets or proceedings in other countries.

of business (single process)), but the creditors in any other member state where their claims are payable can, at their sole discretion, elect to file a petition seeking the commencement of a separate insolvency proceeding in that jurisdiction (plural processes); or

- if the debtor has several independent businesses in more than one member state, the courts of the jurisdictions of the domicile of these businesses (plural processes).

(2) Precautionary measures ordered in one member state are enforceable against the assets of the debtor in any of the other member states through letters rogatory, subject to domestic law.

(3) Plural processes are fully independent and governed by the law of each jurisdiction, subject to the adoption of precautionary measures and the power of the trustee of one insolvency proceeding to file motions in other proceedings.

(4) For a single process:

- all creditors file proofs of claims and exercise their rights under the law and before the court of the jurisdiction where the bankruptcy was adjudicated;

- claims payable in one member state have preference of payment on the assets of the estate located in that member state;

- the trustee's appointment and powers are recognised by the other member states, but the enforcement of assets is governed by the law where the assets are situated; and

- creditors secured with mortgages or pledges granted before the payment cessation can enforce their rights before the courts where the collateral is located.

(5) For plural processes:

- any remaining balance after final distribution is delivered to the other courts hearing the other insolvency proceedings;

- assets of the debtor located in a member state where no insolvency proceeding was commenced are included in the estate of the insolvency proceedings of the court that adjudicated bankruptcy first; and

- the court of the debtor's domicile hears all personal claims.

7.3 International private rules provided for in the Bankruptcy Law

7.3.1 Argentine courts' jurisdiction

7.3.1.1 General principle

There is a general rule according to which Argentine courts may adjudge bankrupt any person or entity whose domicile is fixed in Argentina.

Argentina's National Constitution establishes equality under the law for all its inhabitants.[199] Argentine insolvency law then applies, in principle, to debtors domiciled in Argentina, and the citizenship or nationality of the debtor are of no consequence.

Hence, in principle, Argentine courts have no jurisdiction over debtors domiciled abroad.

7.3.1.2 Special rule

A special rule establishes an exception to the general rule in the event that a debtor that is domiciled outside of Argentina has assets in Argentina and obligations payable in this country.[200]

In that case, local creditors (the owners of credits payable in Argentina, whatever their nationality, citizenship or domicile) may file a petition to initiate the bankruptcy liquidation proceedings of the debtor. The Argentine court may declare the bankruptcy judgment, but with the following limited effects as the sole purpose is the liquidation of assets located in Argentina in order to distribute the proceeds among local creditors, according to the rules of Argentine insolvency law:

(i) the effects of this type of bankruptcy is limited to Argentine territory (territoriality); and

(ii) assets in Argentina are submitted to bankruptcy rules, but the status of the debtor is not affected, and there is no disqualification for the bankrupt person.

Applying this special rule Argentine courts have declared corporations domiciled outside Argentina bankrupt.[201]

Upon commencement of a liquidation case in Argentina an estate will be created comprising all of the foreign resident's property located in Argentina.

The venue for the insolvency proceedings of a foreign resident in Argentina will be the court of the place of the foreign resident's administrative office in Argentina or, in the absence of any

[199] Those who have fixed their residence in Argentina.
[200] ABL, art 2(2).
[201] In re: "Pacesetter Systems Inc", CNCom, sala C, 10/2/93, following the opinion of the "Fiscal de Camara" Raúl Calle Guevara No. 66844/92; CSJN, 9/6/94, ED 159-59.

such administrative office, the court of the place in Argentina where the foreign resident has its main business, commercial activities or exploitation.

7.3.2 Insolvent debtors domiciled abroad with assets in Argentina but without credits payable in Argentina

In Argentina, there are hardly any judicial precedents for the situation of debtors domiciled abroad but who has assets in Argentina, but without credits payable in this country.

In accordance with the rules reviewed above these debtors may not be adjudged bankrupt in Argentina.

There are no answers[202] as to how Argentine courts should decide in the event of a foreign insolvency administrator's claim regarding the assets located in Argentina.

7.3.3 Foreign insolvency proceedings when there are assets and local creditors in Argentina but no insolvency proceedings have been opened in this country

7.3.3.1 First rule: territoriality of the foreign bankruptcy order

According to article 4 of the Bankruptcy Law, the foreign bankruptcy proceedings may not be invoked in Argentina in order to dispute the rights of local creditors, enforceable on assets in Argentina. The foreign bankruptcy proceedings be also not be invoked to set aside or make voidable the acts carried out in Argentina by the debtor.

For example, in principle the acts carried out by the debtor with creditors in Argentina that would be considered submitted to revocation (or voidable) in the country where bankruptcy proceedings have been opened, remain valid in Argentina. On the other hand, it is hard to predict as to what extent a foreign ordered stay of proceedings regarding local assets would be recognised and applied in Argentina.

7.3.3.2 Second rule: limited extraterritoriality of the foreign order for commencement of insolvency proceedings

Article 4 of the Bankruptcy Law further provides that the foreign insolvency judgment[203] may be used by domestic creditors, and by the debtor himself, in order to obtain the commencement of a liquidation proceeding in Argentina. In this case, evidence of the debtors' insolvency need

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[202] Nor jurisprudential precedents either. As set out in the paper "Rules of international private law, priorities on insolvency and the competing rights of foreign and domestic creditors, under the Argentine insolvency law" available at https://www.iiiglobal.org/sites/default/files/13RULES%20OF%20INTERNATIONAL%20PRIVATE%20LAW.pdf, the sole reported precedent *In re Panair do Brasil SA* is an old case dating from 1972 and the judgments pronounced on it were so unusual that it is highly unlikely that they would be followed by Argentine courts at present. The chief judgments *In re Panair do Brasil SA* were: CNCom, sala B, 18/11/70, LL, 143-146 y JA, 12 [1971] 217; CSJN, 5/7/72; Juzg Nac 1a. Inst Com, 29/12/75, ED, 70-387; and CNCom, sala B, 13/9/76, ED, 70-390. There are full transcriptions in Antonio Boggiano, Derecho Internacional Privado, Ed. Abeledo-Perrot, Buenos Aires, 1991, t. II, p. 936 and p. 951. In the doctrinal field: Radzyminski, Alejandro P., "Sistema de Derecho Internacional Privado Argentino", RDCO, 1990-A-222, esp. note 61.

[203] The order opening the insolvency proceedings in general in another country.

not be produced. The foreign insolvency judgment has, in this way, extraterritoriality[204] provided that it must firstly be recognised by the Argentine courts through the *exequatur* proceedings. Its validity is however limited for it may only be used as an act of bankruptcy in Argentina.

The only purpose of the insolvency proceedings in this case is to sell the assets located in Argentina and distribute the proceeds amongst local creditors.

A problem of interpretation may arise as to how to identify which foreign proceedings regarding insolvency may be considered equivalent to the Argentine term *concurso*.

7.3.4 Simultaneous proceedings

A bankruptcy claim may proceed against the same debtor simultaneously before an Argentine court and a foreign court. In broad terms, the bankruptcy ruling of the court of each jurisdiction will mainly affect the assets located in such jurisdiction.

7.3.5 Remaining discrimination rules and the rule of priority

According to the Bankruptcy Law, in respect of the principle of reciprocity the difference between foreign and domestic credits flows from the following criteria:

(a) foreign credit is the credit payable solely outside Argentina;

(b) domestic or local credit is the credit payable in Argentina; and

(c) credit with two or more alternative domiciles of payment, even when the option is with the creditor (the right to choose the country of enforcement), should be considered domestic credit.

Moreover, the acceptance of foreign credits in Argentine insolvency proceedings as a result of the abovementioned criteria makes it essential to produce evidence that a similar but domestic credit should be recognised, accepted, and could be collected, on the same conditions, in insolvency proceedings in the country where the foreign credit is payable (reciprocity).

The principal problem of the construction of this rule has been to determine who has the burden of proof of the foreign law.

As an important feature of Bankruptcy Law, secured creditors are excluded from the rule of reciprocity and do not have to produce evidence of the foreign law as the unsecured creditors need to.
In the event that the foreign creditors' claims satisfies the rule of reciprocity and is accepted in an Argentine insolvency proceeding, the following step is to distinguish different scenarios concerning the collection of these credits:

[204] That is validity beyond the border of the country where bankruptcy has been ordered.

(a) In reorganisation proceedings in terms of the Bankruptcy Law there is no discrimination;

(b) In liquidation proceedings in terms of the Bankruptcy Law:

- there is no discrimination when the foreign credit does not belong to other foreign bankruptcy proceedings; and
- the rule of local priority applies when the foreign credit (payable solely outside Argentina) also belongs to foreign bankruptcy proceedings. The exact legal meaning of "belonging" to foreign bankruptcy proceedings is not clear and there is no judicial construction of the rule.

The effect of the rule of local priority is the subordination of this type of foreign credit (payable abroad and belonging to foreign bankruptcy proceedings), ranking it behind all other classes of credits.[205] In liquidation proceedings, this type of foreign credit could be collected before shareholders' claims but solely after the total amount of credits of all prior classes and degrees has been satisfied, which in reality means that when this subordination rule is applicable the collecting possibilities virtually to non-existent.

7.4 Some cross-border insolvency cases

7.4.1 In re Arthur Martin SA[206]

This was a case concerning priorities regulated in terms of foreign law, when these priorities were claimed in Argentine insolvency proceedings.

The Bankruptcy Law contains no provision that answers the question of which law should be applied to the privilege itself in the situation where a credit whose privilege is ruled by foreign law is recognised in Argentine bankruptcy proceedings and is not submitted to the rule of local priority.

In re Arthur Martin SA the court stated that the ranking of all priorities (whether domestic or foreign) should be governed by the *lex fori*, and this would be the Argentine law when the proceedings have been commenced by a judge in Argentina.

7.4.2 In re Pan American

For the purpose of declaring the commencement of Pan American liquidation proceedings in a Buenos Aires court in order to realise the assets of that company in Argentina, the Argentine judge held that Chapter 11 of the US Bankruptcy Code could be considered equivalent to the Argentine term *concurso*.

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[205] See the discussion in para 6.3.6 above in this regard.

[206] Juzgado Nacional de Primera Instancia en lo Comercial No. 7, September 11, 1989, cited by María Blanca Noodt Taquela, Derecho Internacional Privado, Ed. Astrea, Buenos Aires, 1992, p. 400.

7.4.2.1 Cases dealing with the principle of reciprocity

Although the provisions of article 4 of the Bankruptcy Law are imprecise, the judicial construction around the topic of the evidence to be produced in order to prove reciprocity tends to be broad and flexible.

In re Cacace, Horacio / Inc de impugnación por Sherrant SA, the court held that the burden of proof did not solely rest on the creditor and instead ordered all the parties (the creditor, debtor and trustee) to identify and produce evidence of the foreign law involved in the rule of reciprocity.[207]

Similarly, flexibility in the judicial criteria was set forth *In re D'Angelo, Lydia v. Paino, Myriam*[208] where the court considered a copy of the American Bankruptcy Code of 1978 sufficient in order to produce evidence satisfying the rule of reciprocity, and therefore accepted a credit of the holder in due course for a check payable in the United States.

Likewise, in another case, the opinion of a British expert explaining that there were non-discrimination rules for foreign creditors according to the bankruptcy law of the United Kingdom was considered sufficient by an Argentine judge in order to verify that the rule of reciprocity was satisfied by a creditor with domicile of payment in England.[209]

Self-Assessment Exercise 6

Question 1

Which one of the following statements is correct?

(a) Argentina has adopted the UNCITRAL Model Law.

(b) The principle of local preference applies both for reorganisation and liquidation cases.

(c) A foreign bankruptcy order can be invoked in Argentina, in order to dispute the rights of local creditors, enforceable on assets in Argentina.

(d) A debtor domiciled outside of Argentina can be declared bankrupt as long as it has assets in Argentina and creditors payable in this country.

[207] CNCom, sala B, 22/8/90, following the opinion of the "Fiscal de Camara" Raul Calle Guevara, No 62710/90.
[208] JCCRosario, 1a. Nom., 11/12/87, RJVS, II-201, commented on by Alejandro Menicocci.
[209] JCCRosario, 13a. Nom., 26/2/96, "Massey Ferguson SA", DYE 5-306, commented on by Mario Eugenio Chaumet

Question 2

What are the effects of foreign insolvency proceedings over assets located in Argentina?

Question 3

Who are foreign creditors for the ABL and what are their rights in a local insolvency proceeding?

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS[210]

8.1 General

Argentina has two regimes concerning enforcement of foreign judgments or arbitral awards.

If an international treaty for the enforcement of foreign judgments or arbitral awards exists between a foreign country and Argentina, the rules of such a treaty will prevail.

Argentina has entered into numerous treaties with different countries, some of which would apply in the event of an insolvency proceeding. The applicability of a given treaty will generally depend, amongst other things, on the domicile of the parties and / or the place of performance of the agreement.

Argentina became party to various treaties including, amongst others,[211] in 1988 to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) and is bound by its provisions, with certain exceptions as described below.

Argentina will only apply the New York Convention to the recognition and enforcement of foreign arbitral awards made in the territory of another contracting state, on the basis of reciprocity. It will also apply the New York Convention only to differences arising out of legal

[210] For further insight see the paper entitled "Enforcement of judgments in Argentina: overview" available at https://content.next.westlaw.com/7-619-5451?__lrTS=20210613213818302&transitionType=Default&contextData=(sc.Default)&firstPage=true.

[211] Such as the Treaty of International Procedural Law, approved in the South-American Congress of Private International Law held in Montevideo in 1898, ratified by Argentina by Law 3,192.; Treaty of International Procedural Law, approved in the South-American Congress of Private International Law held in Montevideo in 1939-1940, ratified by Dec. Ley 7771/56 (1956); Panamá Convention of 1975, CIDIP I: Interamerican Convention on International Commercial Arbitration, adopted within the Private International Law Conferences – Organization of American States, ratified by Law. 24,322 (1995) and Montevideo Convention of 1979, CIDIP II: Interamerican Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards, adopted within the Private International Law Conferences – Organization of American States, ratified by Law 22,921 (1983).

relationships, whether contractual or not, which are considered as commercial under its national law.

The New York Convention will be interpreted in accordance with the principles and clauses of the Argentine National Constitution in force or those resulting from modifications made by virtue of the Constitution.

In the absence of such a treaty, the corresponding procedural code will apply. The National Code of Civil and Commercial Procedure (CPCC) will be applicable if the defendant is domiciled in the Autonomous City of Buenos Aires or if the matter at hand will be debated before a federal court. Provincial procedural rules will be applicable when the matter at issue is to be debated before a provincial court. When a foreigner is involved, federal procedural rules (that is, the CPCC) are, in principle, applicable and therefore these rules shall hereinafter be analysed in respect of the recognition of foreign judgments.

In order to be recognised, foreign court judgments must comply with the following requirements as set out by article 517 of the CPCC:

(1) Argentine courts do not automatically acknowledge a foreign court's original jurisdiction over the matter. The competency of the jurisdiction of the foreign court that rendered the judgment is analysed based on the Argentine rules of jurisdiction. The judgment must have been issued by a court considered competent by the Argentine principles of conflict of laws regarding jurisdiction, and must have been final in the jurisdiction where it was rendered and resulted from a personal action or an *in rem* action concerning movable assets. If the judgment resulted from an *in rem* action, the disputed personal property must have been transferred to Argentina during or after the prosecution of the foreign action;

(2) The defendant against whom enforcement of the judgment is sought must have been duly served with a summons and, in accordance with due process of law, given an opportunity to defend himself against the foreign action;

(3) The judgment must have been valid in the jurisdiction where it was rendered, and its authenticity must be established in accordance with the requirements of Argentine law;

(4) The judgment must not violate any principles of the public policy of Argentine law. Public policy includes both formalities and matters of substantive law;

(5) The judgment must not be in conflict with a prior or simultaneous judgment of an Argentine court;

(6) Reciprocity is not required for an Argentine court to recognise a foreign judgment; and

(7) The enforcement of the foreign judgment must be brought within five years of the judgment.[212]

[212] Civil and Commercial National Code, art 2560.

8.2 Formalities

The enforcement of a court judgment or arbitration award must be requested to a lower court judge by means of *exequatur* proceedings, with reference to the following:

- a notarised copy of the decision that must be filed with the Argentine court and the petitioner must file a statement evidencing that each of the conditions required by law has been fulfilled;

- all documents (originals or notarised copies) submitted to the court must be authenticated by the Argentine consulate with jurisdiction over the country where the documents were issued. If the relevant country has ratified the 1961 Hague Convention on the Abolition of Legalization of Documents, then authentication by the Argentine consulate may be substituted with the Apostille made available by the Hague Convention;

- all documents not in Spanish must be translated into Spanish by a translator registered in Argentina in order to be admitted by a local court; and

- the amounts expressed in foreign judgments must be converted to the Argentine currency. A court tax must be paid by the party seeking enforcement, and the costs and expenses will be charged to the defeated party in the proceedings.

Foreign arbitral awards are subject to the same requirements applicable to the recognition of foreign judgments. If these requirements are met, an Argentine court will accept arbitral awards (either at law or in equity) rendered outside Argentina.

In the case of foreign arbitration awards, in addition to the abovementioned requirements, the following are also necessary:

- the jurisdiction extension in favour of foreign arbitration has to have been valid (that is, that the arbitration only involves matters of international property and not matters where Argentine courts have exclusive jurisdiction, or cases where agreement upon a different jurisdiction is prohibited by law); and

- the matters may be validly referred to arbitration pursuant to Argentine law (this means that there are matters that can be subject of a settlement).

Once the *exequatur* is obtained the judgment may be enforced in Argentine courts.

Enforcement shall be made according to the same rules established for judgments made by Argentine courts.

In a recent case, Argentina's Federal Supreme Court of Justice denied the recognition and enforcement of a judgment of a New York court (which ordered Argentina to pay a certain amount of money) on the grounds of public policy violation, as the Argentinian court concluded that the foreign decision did not take into consideration the specific restructuring process of

public debt required under local rules and in accordance with the Argentinian National Constitution.[213]

Self-Assessment Exercise 7

Question 1

How can one determine which regime applies concerning enforcement of foreign judgments or arbitral awards?

Question 2

Identify the two universal circumstances that would imply denial of recognition of foreign judgments under the National Code of Civil and Commercial Procedure.

Question 3

Which one of the following statements is correct:

(a) Foreign court judgments are automatically acknowledged by Argentine courts.

(b) In order to be acknowledged, foreign court judgments must have been valid in the jurisdiction where they were rendered no matter if they violate Argentine public policy.

(c) The enforcement of a foreign court judgment must be requested to a lower court judge by means of *exequatur* proceedings.

(d) Foreign court judgments shall not be acknowledged unless it is proven the corresponding reciprocity.

Question 4

Is there a maximum term for the judgments to be brought for recognition and enforcement?

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

[213] *Claren Corporation v National Government*, 03/06/2014.

9. INSOLVENCY LAW REFORM

There are some initiatives to reform the Bankruptcy Law itself and to pass a new bill for consumer bankruptcy proceedings, as well as some other projects by the Senate and some others by the House of Representatives. However, none of these other projects are noteworthy proposals since they are not considered a priority in Argentina´s current political agenda nor do they have political consensus in order to obtain the majority required to get passed.

Nevertheless the most relevant modifications proposed include, amongst many others: to incorporate the advances in digitalisation and information technology in the proceedings; authorise electronic auctions of goods or assets; extend deadlines such us the period of exclusivity; eliminate the one year limitation since a declaration of performance of any prior reorganisation plan filed by the debtor in order to allow the filing of a new petition for reorganisation; encourage and / or regulate out-of-court preventive agreements for small and medium enterprises and consumers; and lessen the initial requisites for the opening of the proceedings of restructuration.[214]

10. USEFUL INFORMATION

10.1 Online resources in English

- For the Bankruptcy Law in English see https://www.iiiglobal.org/sites/default/files/16-Argentine_Bankruptcy_Law.pdf (Please note that this is not an updated version and as such it does not contain all amendments.)
- For the National Constitution of Argentina in English see http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf
- For Argentina's Companies Law in English see https://www.cnv.gov.ar/descargas/web/blob/653A0DC2-12C0-4A55-8C27-B478BF8749D
- For Argentina's Civil and Commercial Code in English see https://www.cnv.gov.ar/descargas/web/blob/A05B275E-7127-4442-82A1-803FDFBD495
- For other related legislation in English see https://www.cnv.gov.ar/sitioWeb/MarcoRegulatorio?panel=1
- For relevant cases of the Argentina Supreme Court in English see https://sj.csjn.gov.ar/sj/suplementos.do?method=ver&data=fr20182eb

[214] For a more complete insight on the current initiatives to reform the Bankruptcy Law please see https://www.marval.com/publicacion/concursos-y-quiebras-de-los-consumidores-proyectos-de-ley-13736&lang=en.

10.2 Other online resources in Spanish

- For the website of the Ministry of Economy and Finance that contains legislative information updated the Centre of Documents and Information) see www.infoleg.gov.ar

- For the website of the judiciary that contains information on all cases heard by the national and federal courts see www.scw.pjn.gov.ar

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Question 1

Identify the idiosyncrasy of Argentine insolvency system by answering the following:

(a) To what legal tradition does Argentina pertain?

(b) Is the Argentine Bankruptcy Law a National Act or are there as many bankruptcy laws as there are states?

(c) Who has jurisdiction in insolvency matters and what law applies to the judicial procedure?

(d) Has Argentine Bankruptcy Law been amended?

Question 2

In which other procedures can creditors enforce their rights other than the insolvency proceedings?

Commentary and feedback on Self-Assessment Exercise 1

Question 1

(a) Argentina is a civil law country.

(b) In accordance with Argentina's National Constitution, the National Congress enacts one Bankruptcy Law that is applicable throughout the country, together with the rest of the codes (concerning civil, commercial, criminal, mining, labour and social security matters) and the Companies Law.

(c) In insolvency matters jurisdiction is exclusive to provincial judges with ordinary jurisdiction. The judicial procedure shall be governed by the provincial procedural laws where the insolvency proceeding is opened.

(d) Argentine bankruptcy law has been often partially amended in order to face recurrent economic crisis.

Question 2

Before the filing of bankruptcy petition creditors can exercise several pre-bankruptcy remedies, for instance:

- Precautionary measures (such as, an attachment order over the debtor's assets). Creditors entitled to an executory process can obtain a precautionary measure without posting a bond.

- Executory proceedings: these give the creditors access to expedited summary proceedings but in which the final judgment rendered is only of a preliminary nature and could be later overturned in a further procedure.

- Ordinary court proceedings that take more time but lead to a final judgment.

Self-Assessment Exercise 2

Question 1

Which are the two main mechanisms for a trade creditor to secure the payment of unpaid debts?

Question 2

What is the main difference between the two abovementioned mechanisms?

Question 3

How do mortgages and pledges grant a priority?

Question 4

What is the difference between trusts and security assignments?

Question 5

How does an insolvency scenario affect secured rights and personal guarantees?

Commentary and Feedback on Self-Assessment Exercise 2

Question 1

Payments can be secured either by secured rights (mortgages, possessory and non-possessory pledges, security assignments and trusts) or by a third-party guarantor (personal guarantee: *fianza* or *aval*).

Question 2

Personal guarantees do not grant priority over assets of the debtor but make third parties liable for the payment of the debtor's debts.

Question 3

Mortgages grant the registered mortgagee a priority right over the underlying asset based on the chronological order in which each mortgage is registered.
The pledge grants the creditor a priority right over the proceeds of the sale of the pledged asset (either if it remains in the debtor's possession or not).
The secured creditor by a mortgage or pledge will be entitled to foreclosure of the guarantee through a special summary proceeding.

Question 4

In a trust there is no limitation, and trusts may be used as vehicles for taking security over most forms of movable and real estate assets. On the contrary, security assignments are limited to a means of taking security over rights or credits, including, without limitation, receivables.

Question 5

(a) Both foreclosures of a mortgage or of a pledge are subject so special rules if the debtor is subject to a bankruptcy proceeding but they are still particularly protected. They may request the realisation of the collateral at any time, provided that proof of the claim and privilege has been duly filed to the trustee, providing supporting evidence thereof; bankruptcy adjudication does not suspend the accrual of interest on the secured claims and they are granted a special priority in the event of liquidation. In the event of a restructuring proceeding they constitute one of the mandatory categories of creditors and any proposal to them will require consent of all secured creditors.

(b) Third-party guarantees are not affected by the bankruptcy, judicial or extrajudicial recovery of the debtor. The creditor maintains the right to enforce the obligation against the guarantors.

(c) In a trust the assets are hold as a separate state by the trustee and therefore are not subject to insolvency proceedings of the settlor, trustee or beneficiaries, unless creditors can claim and provide evidence that their claims were established fraudulently, or if the trust is declared null and void in an insolvency proceeding.

Self-Assessment Exercise 3

Question 1

What are the common substantive tests that have to be complied with in order to trigger either a judicial reorganisation or a liquidation proceeding?

Commentary and Feedback on Self-Assessment Exercise 3

Question 1

Common grounds for opening both a judicial reorganisation or bankruptcy proceeding are based on the presence of all of the following, namely that the:

- debtor is one of the parties subject to insolvency proceeding in accordance with articles 2 and 5;

- debtor is in cessation of payment either by confession or other elements evidencing it in accordance with articles 1 and 79; and

- court is competent to hear in the insolvency proceeding according to rules set forth by article 3.

Self-Assessment Exercise 4

Question 1

With reference to each of the statements below: indicate whether it is true or false, and if false, provide a reason for your answer:

(a) A secured creditor can avoid filing proof of the claim and request the realisation of the collateral at any time as long as such creditor files the proceeding before the bankruptcy court.

(b) Directors that resigned from their position before bankruptcy was declared are not subject to disqualification.

(c) The counterparty of an uncompleted agreement with the debtor is free to terminate the agreement in case of the debtor's bankruptcy.

(d) Bankruptcy liability in accordance with articles 173/4 of the Bankruptcy Law only applies to acts that took place during the clawback period.

(e) The court's decision on bankruptcy extension does not require the individual or corporation to which the bankruptcy shall be extended to be in cessation of payments.

Question 2

Name one liquidating and one non-liquidating way to terminate the bankruptcy proceedings.

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

(a) False. The creditor must file the proof of claim first and only then he may demand the sale by means of a petition in the insolvency proceedings which shall be processed separately.

(b) False. Disqualification is extended to directors who have held office since the cessation of payments (the insolvency date) even if they are no longer directors on the date of the bankruptcy award.

(c) False. The counterparty is bound to comply with whatever the court determines. So if the judge decides that the agreement shall be fulfilled, the counterparty cannot object to that and is only entitled to full payment of the amounts owed and to request a better guarantee other than the preference set forth by article 240 of the Bankruptcy Law (see article 144 of the Bankruptcy Law).

(d) False. Clawback period is only relevant for voidable acts as set forth by articles 118 and 119 of the Bankruptcy Law. The directors' liability for wrongful conduct extends back to one year before the payment cessation.

(e) True.

Question 2

Liquidating way: final distribution. Non liquidating way: acceptance.

Self-Assessment Exercise 5

Question 1

In table format, indicate the relevant articles of the ABL that deal with the following aspects in respect of corporate rescues and bankruptcy proceedings:

- Cessation of payments
- Parties subject to corporate rescues or liquidation proceedings
- Competent court
- Requirements that debtors have to fulfil in order to file for reorganisation or bankruptcy
- Management by the debtor
- Invalid acts
- Automatic stay
- Accrual of interests
- Non-monetary debts
- Proof of claims
- Early payment (on labour claims)
- Trips abroad
- Agreements regulation
- Legal preferences
- Secured creditors rights

Question 2

Write an essay on whether there is a legal obligation to file for corporate rescue in specified circumstances or not, and refer to specific articles of the ABL in support of your argument.

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

	Cessation of payments	Parties subject	Competent court	Requirements for filing	Management by debtor	Invalid acts	Automatic stay	Accrual of interests
Corporate rescue	Articles 1 and 11 2)	Article 2 and 5	Article 3	Articles 1, 2, 3, 6, 9, 10 and 11	Articles 15, 16 and 17	Article 17 and 22	Article 21	Article 19
Bankruptcy proceedings	Articles 1, 78, 79 and 86	Article 2 and 5	Article 3	Articles 1, 2, 3, 6, 9 and 86	Articles 107, 109, 110, 142, 179 and 182	Article 88 inc.5);109 and 115/124	Article 132	Article 129

	Non-monetary debts	Proof of claims	Early Payment	Trips abroad	Agreements regulation	Legal preferences	Secured creditors rights and obligations
Corporate rescue	Article 19	Article 32/38 and 56	Article 16	Article 25	Article 20	Articles 239/250	Article 32, 21, 43, 44, 45, 47, 57
Bankruptcy proceedings	Article 127	Article 200	Article 183	Article 103	Articles 143/159	Articles 239/250	Article 200, 126 and 209

Question 2

The essay should refer to the following ABL characteristics:

The mechanism chosen by ABL for the optimal initiation of reorganisation proceedings is not the stick but the carrot.

ABL does not set a time frame for directors to commence insolvency proceedings in a timely manner subject to risk exposure to criminal liability and the obligation to pay damages.

Nor does the ABL set different behavioural standards to directors once a company goes insolvent (or reaches the insolvency zone) in order to incentivize them to be more diligent in commencing formal insolvency proceedings.

On the contrary, the system uses carrots inducement mechanisms.

Legal rules that act as an incentive for triggering insolvency proceedings are for instance:

- rules on the automatic stay (article 21);
- accrual of interest suspension (article 19);

- the management by debtor system (articles 15,16 and 17);
- the exclusivity period for managers to file the reorganisation plan (article 41 and subsequent); and
- agreements regulation (article 20).

Self-Assessment Exercise 6

Question 1

Which one of the following statements is correct?

(a) Argentina has adopted the UNCITRAL Model Law.

(b) The principle of local preference applies both for reorganisation and liquidation cases.

(c) A foreign bankruptcy order can be invoked in Argentina, in order to dispute the rights of local creditors, enforceable on assets in Argentina.

(d) A debtor domiciled outside of Argentina can be declared bankrupt as long as it has assets in Argentina and creditors payable in this country.

Question 2

What are the effects of foreign insolvency proceedings over assets located in Argentina?

Question 3

Who are foreign creditors for the ABL and what are their rights in a local insolvency proceeding?

Commentary and Feedback on Self-Assessment Exercise 6

Question 1

The correct answer is (d).

Question 2

Argentina has adopted the doctrine of territoriality pursuant to which insolvency proceedings in a country affects, in principle, only assets located in that country. Therefore, local creditor rights enforceable on assets in Argentina cannot then be disputed by invoking foreign bankruptcy proceedings. However, a foreign insolvency judgment may be used to obtain the commencement of a liquidation proceeding in Argentina.

Question 3

Foreign creditors are those who hold credits payable solely outside of Argentina (no matter their nationality or domicile).

Foreign creditors may or may not belong to a foreign insolvency proceeding.

If they do not belong to a foreign insolvency proceeding, their participation in an Argentine insolvency proceeding is only subject to the principle of reciprocity that requires filing evidence that reciprocally shows creditors holding claims payable in Argentina are permitted to participate in an insolvency proceeding commenced in the jurisdiction where such claims are payable in equal conditions with the domestic creditors of such jurisdiction.

If they do belong to a foreign insolvency proceeding, not only are they subject to the principle of reciprocity but to two other principles as well when the insolvency proceeding in Argentina is a liquidation:

- according to the principle of local preference foreign creditors will only have the right to the balance of the debtor's remaining assets after all the claims of the creditors participating in the Argentine liquidation process have been fully satisfied; and

- according to the principle of dividend parity: payments they have received in a foreign liquidation process will be computed on account of the general distribution available to such creditors under the Argentine liquidation process.

Self-Assessment Exercise 7

Question 1

How can one determine which regime applies concerning enforcement of foreign judgments or arbitral awards?

Question 2

Identify the two universal circumstances that would imply denial of recognition of foreign judgments under the National Code of Civil and Commercial Procedure.

Question 3

Which one of the following statements is correct:

(a) Foreign court judgments are automatically acknowledged by Argentine courts.

(b) In order to be acknowledged, foreign court judgments must have been valid in the jurisdiction where they were rendered no matter if they violate Argentine public policy.

(c) The enforcement of a foreign court judgment must be requested to a lower court judge by means of *exequatur* proceedings.

(d) Foreign court judgments shall not be acknowledged unless it is proven the corresponding reciprocity.

Question 4

Is there a maximum term for the judgments to be brought for recognition and enforcement?

Commentary and Feedback on Self-Assessment Exercise 7

Question 1

Applicable regime will depend on if an international treaty exists or not. If it exists, the treaty will prevail.

In the absence of such a treaty, rules of the corresponding procedural code will apply. Either the rules of the National Code of Civil and Commercial Procedure if the defendant is domiciled in the Autonomous City of Buenos Aires or if the matter at hand will be debated before a federal court or the rules of the Provincial procedural rules when the matter at issue is to be debated before a provincial court.

Question 2

Violation of:

- due process of law (that is if the defendant against whom enforcement of the judgment is sought has not been given an opportunity to defend himself against the foreign action); or

- public policy principles of Argentine law;

would both serve as sufficient grounds to deny recognition and enforcement of a foreign judgment.

Question 3

The correct answer is (a).

Question 4

Yes, there is. Once a five-year term has gone by without the judgment recognition been commenced by the means of the *exequatur* proceeding, the petition shall be denied.

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