Planet of the APEs?


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The incorporation of APEs into the Argentine Bankruptcy legislation in 1995 was welcomed with enthusiasm by the Argentine business and legal community. The exhausted and bureaucratic Argentine judicial system gravely needed flexible instruments of the like to facilitate corporate restructurings without recourse to a costly, long and painful judicial process (the *Concurso Preventivo*, a reorganisation procedure similar to the Chapter 11, or the bankruptcy).

However, the eight quite vague articles that were finally incorporated to the Bankruptcy Law fell short of duly regulating all aspects of the APE that would have been needed to transform it into the flexible, useful instrument that was expected and to guarantee legal certainty for its general use by debtors and creditors (both domestic and foreign) and for its implementation by the courts.

These negative aspects prevented most debtors from using the APE to restructure their debts, until the Argentine crisis and the mega-devaluation of the peso in 2001/2002 forced almost every Argentine company to refinance or restructure its debts. It is worth remembering that almost all medium and large Argentine companies had their debts denominated in dollars, in the context of a 10-year peg between the peso and the dollar set forth by the Convertibility Law. Consequently, following a 260 per cent devaluation of the peso in six months at the beginning of 2002, such debts became unpayable under their original terms. In that scenario, many companies (representing around 40 per cent of the total debt restructured) had to turn to the APE to try to cram down the restructuring plans on holdouts and/or small hard-to-find creditors (especially in the case of bonds issuances). Thus, the courts had to face this widespread use of the not well-regulated APE, without the benefit of any significant precedents, which slowed the process and made it more complicated and uncertain than it should be.

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No one will question that the regulation of the APE needs to be thoroughly rethought, amended and complemented. And that such a reform should, once and for all, cover all aspects that recent experience showed should be clarified and improved. Among many others, the main issues that should be addressed by a comprehensive reform of the APE should include: (i) excluding commercial creditors and debts with tax authorities from the APE (the Argentine IRS systematically opposes every APE until the fiscal debts of the debtor are finally determined, which may take a long time and delay the judicial approval of the restructuring proposal); (ii) clarifying whether the court tax applies to the APE or not (and, in the first case, indicating whether it should be determined by the whole amount of unsecured debt or only by the one being crammed down); (iii) clearly indicating voting procedures and majorities requirement, particularly in the case of bondholders, and the treatment of accrued and unpaid interest; (iv) expressly admitting the possibility of categorising creditors for the purpose of presenting each with a different proposal; and (v) establishing the consequences of default under the new debt instruments issued to implement the restructuring (both in case of payment and technical defaults).

However, based on experience, all of these reforms could take a long time. And with almost half of the companies still being affected by the unbearable burden of their dollar-denominated debts (especially when most of their income is in denominated in devaluated pesos), granting debtors and creditors instruments and appropriate incentives to give a rapid response to this issue should be a priority for national policy. Unfortunately, this is not the case. Last year, the Senate approved a bill that contemplated certain temporary amendments to the APE—which were to be in effect exclusively during the public emergency declared by Congress and for an additional 12-month period (until December 2005)—designed to foster out-of-court agreements and give both creditors and debtors adequate incentives to close mutually satisfactory restructurings. At the time of writing the Chamber of Representatives has not yet considered the bill. Among other issues, such bill contemplates temporarily reducing the majority needed to approve an APE from the actual two thirds of the aggregate unsecured liabilities of the debtor plus a majority of the headcount of creditors to just 51 per cent of the total unsecured debt, provided that the court considers that the restructuring proposal is fair to all parties (based on the principle of the 'sharing of efforts') and not discriminatory. We believe that the approval of this bill would expedite the closing of many pending restructurings, thus helping Argentine companies to once again concentrate their efforts upon the development and growth (and not just the survival) of their businesses.

Additionally, a package contemplating various tax reforms designed to benefit those debtors and creditors that restructure their debts without recourse to the Concurso Preventivo or bankruptcy, together with certain other structural reforms, was prepared and has been informally proposed to the government, with no results so far. Almost thirty months after the mega-devaluation, there are no doubts that something has to be done. While the burden of an unpayable debt remains on its shoulders, the private sector will be unable to foster economic growth and a real recovery of the labour market. LL