

Securitization Under New Trust Law

By George C. Rogers

EXECUTIVE SUMMARY: The following article outlines a few of the latest innovations in the securitization of assets in Argentina.¹ The initial point of departure for understanding the major legal questions involving securitization of assets is an examination of the newly approved trust law, Law No. 24,441/95, the Trust Law.² The Trust Law regulates the activities of trusts, facilitates the transfer of assets to the trust, allows the trustee to issue certificates of participation in its assets or allows the trustee or third parties to issue debt securities (which are exempt from certain taxes if publicly offered in Argentina) against an expected stream of payments on loans transferred to the trustee secured by the right to foreclosure on such assets and provides certain benefits and protection to the trust to facilitate its operation.

This article briefly explains who can be a trustee and the role of the trustee under the Trust Law, describes how assets, particularly chattel mortgages and mortgages on real property, are transferred from the transferor to the trustee, how the liens are conveyed to the trustee, how the mortgage or lien is foreclosed and how financial instruments such as debt securities may be issued by the trustee or third parties. It also outlines the benefits and protections available under the Trust Law, including protection against claims of creditors of the trustee and of the transferor.³

The trustee must be a financial institution or an institution approved to act as such by the Comisión Nacional de Valores (CNV) in accordance with the Trust Law and a trust agreement.

Authorized institutions. Those institutions permitted to act as financial trustees under the Trust Law include financial institutions chartered by the Central Bank of the Argentine Republic (the Central Bank) and institutions authorized to act as financial trustees by the CNV, in accordance with requirements to be established in the future by the CNV.⁴ The beneficiaries of the financial trustee may (i) own certificates of participation in the assets held in trust by such trustee, or (ii) own debt securities which are secured by such assets held by the trustee. Both the certificates of participation in the assets held in trust issued by the trustee or the debt securities issued by the trustee or third parties are considered securities which may be authorized for public offering in Argentina.

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tina, subject to regulation by the CNV, which will make them eligible for certain tax benefits.⁵

Under the Trust Law, a trust is established when a transferor transfers certain assets (e.g., loans and the mortgages or liens guaranteeing them) to a trustee to administer the assets for the benefit of the beneficiaries indicated in the trust instrument (the trust agreement). The trust agreement imposes on the trustee certain fiduciary duties and other obligations and rights.

Rights and obligations of the trustee. In carrying out its duties under the trust agreement and in accordance with the Trust Law, a trustee will be held to a legal standard of care consistent with the conduct of a prudent or diligent business person in accordance with the level of confidence bestowed upon it. The trust agree-

The assets held in trust will not be reachable by the creditors of the trustee nor by the creditors of the transferor company, except in the case of fraud.

ment may not release the trustee or its employees from its responsibility for acts of negligence and willful misconduct nor from the prohibition on its acquiring assets held by the trust (Trust Law, Arts. 6-7). Trustees are required to report their activities and render an accounting to the beneficiaries of the trust at least once per year, and the beneficiaries may request an accounting in accordance with the trust agreement; furthermore, the trust agreement may not relieve the trustee of such responsibilities (Trust Law, Art. 7). The trustee has a right to payment for its services and reimbursement of its expenses, which may either be fixed in the trust agreement or set by the courts in the case that it is not set forth in the trust agreement, taking into consideration the nature of the trustee's activities and responsibilities (Trust Law, Art. 8).

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The assets transferred to the trustee constitute the only property for which the trustee is responsible to the beneficiaries and are completely separate from the assets of the trustee. The trustee assumes liability limited to the underlying value of the assets held in trust if measures could reasonably have been taken to protect the assets against the risk of any possible damage. (Trust Law, Art. 14. Such liability arises under Art. 1,113 of the Ar-

Trustees are required to render an accounting at least once per year; the trust agreement may not relieve the trustee of such responsibilities.

gentine Civil Code.) Any transferred security interests should be appropriately registered, indicating the transfer in trust of the interest to the trustee. Furthermore, if the trust agreement so permits, the trustee may also hold in trust any assets arising out of the assets assigned in trust or arising out of the sale of the assets held thereby, so long as such detail is indicated upon acquisition and in the pertinent registry (Trust Law, Art. 13).

Removal, withdrawal and replacement of trustee. The trustee may be removed (i) by a court order in the case of non-compliance with its obligations, at the request of the creditor or of a beneficiary, who must nonetheless notify the creditor thereof; (ii) due to death, legal incapacity or bankruptcy in the case of physical persons; or (iii) due to dissolution, bankruptcy or liquidation in the case of corporations. The trustee may withdraw from its position in accordance with the trust agreement, which withdrawal will only take effect once the assets or rights held by the trust are transferred to the new trustee (Trust Law, Art. 9). Upon termination of the appointment of the trustee, the replacement will be a person designated in the trust agreement or in accordance with procedures specified therein. If no procedure is so specified or if the trustee does not accept, the court may designate as trustee a financial entity or another entity approved by the CNV (Trust Law, Art. 10).

The securitization is established pursuant to a trust agreement, transfer of loans, assets or rights to the trustee, including security interests, and the issue of securities in relation thereto.

Trust agreement. Under the Trust Law, the securitization of assets requires first that there exist a trust agreement identifying the trustee, the beneficiaries or intended beneficiaries and specifying the assets encompassed by the trust agreement (Trust Law, Art. 2). The trust agreement must meet certain requirements of law regarding identification of assets and their transfer to the trust and participation in the assets or notes secured by

the assets held in the trust (Trust Law, Arts. 20 and 4). These requirements include: (a) a description of the characteristics and requirements that the assets must meet if not identifiable at the closing; (b) the clarification of the manner in which other assets may be transferred to the trust; (c) the term or conditions under which the assets will continue to be subject to the trust (a maximum of 30 years); (d) how the assets held by the trustee shall be released or disposed of upon conclusion of the trust; and (e) the rights and obligations of the trustee and the manner in which it may be replaced (Trust Law, Art. 4).

Transfer of assets. Upon or after signing the trust agreement, and in accordance with its terms, the trustee will be the transferee of the assets or rights which are the subject of the securitization (Trust Law, Art. 11) and as of that moment, the trustee will be endowed with title, in trust, to the rights to such principal, interest, fees, collateral security, etc., which title and rights may not be challenged by third parties if the transfer and registration are carried out in accordance with the formalities required by applicable law (Trust Law, Art. 12). If the collateral transferred can be registered in a public registry (as in the case of an automobile lien),⁶ the registration of the

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lien should be effected concurrently and shall identify the lien held by the trustee (Trust Law, Art. 13).

When the transfer of a lien over assets securing payment is undertaken to (i) guarantee the issue of securities via a public offering, or (ii) incorporate assets into a company so that the company may publicly issue securities, then the security interests in the assets may be transferred all at once, with each lien clarified individually and registered in the pertinent registry. (Trust Law, Art. 70. This procedure requires the issue of governmental regulations.) The transfer of the rights to receive payments to the trustee and the security interests securing such rights is binding on the transferor company and the trustee as of the date of signing the transfer agreement. The transfer of such rights to payments is binding on third parties, including the original debtor, as of the moment such party is notified (as is generally required for transfers of rights) except in the case that the debtor has previously agreed by contract to be bound without prior notice. The transfer of the security interests are binding against third parties upon registration thereof.

The portfolio of loans that may be transferred and held by a trustee will at no time be considered part of the trustee's assets for bankruptcy or other purposes. (Trust Law, Art 72[c]. See section below for further information.) The transfer may only be challenged by the original debtor in the event that the transferor transferred invalid loans or that payment by the original debtor was effected prior to the transfer (Trust Law, Art. 72[b]).

Mortgage Notes may be issued in relation to housing loans under the Trust Law, allowing for expedited foreclosure procedures under certain circumstances.

Issue and transfer of "Mortgage Notes." A new vehicle simplifying the establishment of property mortgage loans, the issue of notes in relation thereto (*Letras Hipotecarias* or Mortgage Notes) and allowing for their easy transfer and foreclosure is outlined in Titles III, IV and V of the Trust Law.⁷ These Mortgage Notes are defined as debt securities guaranteed by a senior security interest in real property issued as a "Mortgage Note" upon creation of the mortgage.⁸ Only those persons authorized to publicly offer securities as trustees or as administrators of mutual funds may issue and publicly offer certificates of participation guaranteed by Mortgage Notes. (Trust Law, Art. 49. Participation Certificates are not addressed herein.)

Mortgage Notes must be registered in the public property registry and printed on security paper and include the name of the debtor, the amount of the loan obligation and currency, the name of the creditor and other specific terms and conditions, including the place of payment, the interest rate or method of determining it, as well as the pertinent property registry information and any modifications to the terms and conditions (Trust Law, Art. 39[a]-[j]). Un-

der the Mortgage Notes, the underlying property may be sold or rented and it must be insured against fire hazard.⁹

Mortgage Notes may be transferred by endorsement thereon, indicating the name of the new holder and date of transfer; the debtor does not have to be notified and may not challenge such transfer, except in the case that full payment has been made (Trust Law, Art. 40). Furthermore, the endorsing party retains no liability with respect to the transferee.¹⁰ Payments under Mortgage Notes shall be made as indicated in the note,¹¹ which may be issued with coupons to be delivered to the debtor in respect of payments of interest and principal.¹² The Mortgage Note used to secure the underlying loan may be canceled upon presentation of all the coupons, indicating payment of all capital and interest owned, or upon judicial certification of full payment having been made (Trust Law, Art. 48).

In the event of default on a payment, the holder of a Mortgage Note or coupon thereto may automatically

These securities, if issued in a public offering regime and approved by the CNV, will be exempt from various taxes.

foreclose on the mortgage by a special procedure provided for in Title V to the Trust Law.¹³ The holder of a Mortgage Note or any corresponding coupon may use a summary judgment procedure to enforce payment thereon, provided that such summary remedy had been agreed to by the original debtor upon issuance of the Mortgage Note.¹⁴ The statutory limitation on enforcement of a Mortgage Note is three years following the due date on payments of principal or interest (Trust Law, Art. 47).

The Trust Law also establishes certain requirements for the creation of loans which are guaranteed by Mortgage Notes. For instance, origination expenses for mortgage loans used for the purchase of housing in general may not exceed 2 percent of the price of the sale or of an independent valuation (Trust Law, Art. 50). While mortgage loans used for housing will have a maturity of a predetermined number of years, the debtor has a right to prepay fully the loan, which right may not be denied contractually; nonetheless, the parties may agree to a reasonable compensation to be paid by the debtor as stipulated in the loan agreement to apply in the case that such a cancellation takes place before 25 percent of the repayment period had transpired (Trust Law, Art. 51).

Foreclosure on Mortgages under the Trust Law. The special procedure for the foreclosure on mortgages established under the Trust Law may be utilized for Mortgage Notes and all other mortgage loans in all cases so long as there was an express agreement by the borrower

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to be bound by the provisions of Title V of the Trust Law (Trust Law, Art. 52). Under such procedure, when there is a delay of 60 days in the payment of principal or interest, the creditor may notify the debtor of the default, allowing 15 additional days for the delayed payment in full to be received, after which the process of extra judicial foreclosure on the mortgage through an auction may begin.¹⁵

The creditor may then proceed to present before the appropriate court an action by presenting the coupon or Mortgage Note. After allowing 5 days, the court may proceed to set a period of 10 days to vacate the premises, after which the debtor may be forcefully evicted (Trust Law, Art. 54). The creditor would then seek a report from the property registry as to whether any other liens exist and their order of priority to determine if there are claims on the property (Trust Law, Art. 55). The creditor may avoid using the courts altogether and utilize the extra judicial mechanism after requesting that the property registry issue a report verifying if there are any liens or other claims outstanding.¹⁶

Specific public notification requirements to foreclose on the mortgage are stipulated prior to the auction and 7-day notification requirements in the case of the debtor and others holding title to the mortgaged property also apply (Trust Law, Arts. 57 and 59).

In the auction, the initial bid must be the amount of the debt in default (Trust Law, Art. 58) and, once the property is sold and paid for, expenses related to the sale may not exceed 3 percent of the loan (Trust Law, Art. 60). Proceeds from the sale along with pertinent documentation shall be deposited with the competent court within 5 days of the auction, which will give the debtor 5 days to challenge or accept the liquidation of the proceeds (Trust Law, Art. 60).

After the sale of the property and full payment of the offered price, the sale may not be challenged by third parties (Trust Law, Art. 65). The only defenses available to the defaulting debtor are: (a) a default has not occurred; (b) payment was not demanded; (c) the methodology used had not been agreed upon; and (d) lack of proper notice (Trust Law, Art. 64). Once the auction is finalized and the debt repaid, the debtor has a final opportunity to challenge the auction sale through a summary procedure on the following grounds: (i) the non-occurrence of the events required to precede the sale; (ii) the improper liquidation of the proceeds of the sale; and (iii) non-compliance with the procedures established under the guidelines of the Trust Law (Trust Law, Art. 65). The debtor may also recover title to the property within 30 days of the extra judicial sale if it pays to the purchaser the auction price plus 3 percent to cover costs (Trust Law, Art. 66).

If the loan is not paid in full from the proceeds of the auction and sale, creditors may seek judicial assistance to liquidate any remaining debt (Trust Law, Art. 67).

Mortgage loan alternative. In contrast to the Mortgage Note structure, the normal mortgage process may also be utilized for securitizations, or at least may serve as a contrast to the procedures available under the Trust Law. The original pre-Trust Law mortgage process permits both loans and the mortgage to be transferred in one public instrument, to be followed by the notification of the debtor and the filing of the mortgage in the public registry (Argentine Civil Code, Arts. 1459, 1184 [1] and 2505. Law No. 17.801, Art. 2[a]). Before a mortgage and loan are transferred, a title certificate and list of other liens outstanding will be required in addition to the registration (Law No. 17.801, Art. 21). The foreclosure on a standard mortgaged property involves similar steps to those of the Mortgage Notes, although, as explained below, there is a more efficient foreclosure procedure under Mortgage Notes.

Foreclosure by the creditor on a standard mortgage begins with the presentation of the publicly notarized documents to the competent court in order to initiate the notification and later hold a hearing on the issue of whether or not there is a default under the mortgage, to which the debtor can raise several potential defenses (Federal Code of Civil Procedure, Arts. 542, 544, 545, 597). Upon declaring a state of default on the loan, the court would order a restriction on sales or liens of the property and set a date for the auction. The title registry would be consulted so as to ascertain if other liens exist on the property and the actual state of ownership following all prior transfers (Id., Art. 598). Once the report on the property is available, the court has 10 days to deliver the order for the property to be vacated and the auction held,

The securities issued by the trustee should be able to be structured as any other issue of securities in the international marketplace, with a variety of note forms, target markets, and terms and conditions.

barring that the debtor transferred the property to a third party, in which case the transferee will be given the opportunity to pay the debt (Id., Art. 599).

Another alternative, that of mortgage promissory notes (*pagaré hipotecario*), is an endorsable note guaranteed by a mortgage on property in which the issue of the promissory note must be referenced in the public instrument creating the mortgage. The rights pertaining to such a promissory note are transferable and its transfer includes the transfer of the mortgage along with the payment obligation. As a result, there is no need for notarization by a notary public nor for registration of the mort-

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gation in the property registry upon transfer of the promissory note.

Securities may be issued in relation to the secured assets.

The trustee may issue securities through certificates of participation in the trust issued by the trustee or through debt securities guaranteed by the security interests in assets transferred to the trust, which debt securities may be issued by the trustee or by third parties.¹⁷ The securities, if issued pursuant to the public offering regulations and approved by the CNV, will be exempt from various taxes including the value added tax, interest withholding tax, income and capital gains taxes as well as other taxes.

Tax benefits granted to securities issued in a public offering pursuant to the Trust Law include interest payments on debt securities (including original issue discount, if any) which are exempt from income withholding tax, value added taxes (in relation to the issue, purchase, placement, transfer, amortization, interest and cancellation of the debt securities as well as the security interest) and capital gains on the sale or other dispositions of the securities by resident or non-resident individuals and foreign entities without a permanent establishment in Argentina (Trust Law, Art. 83).

It is anticipated that the securities issued by the trustee will be structured as any other issue of securities in the international marketplace, with a variety of possible note forms, target markets, payment and payment terms, other terms and conditions, and standard governing law clauses referencing a foreign state (such as New York) in the matters relating to non-Argentine-specific requirements.¹⁸

The assets transferred to the trustee will be isolated from those of the trustee and those of the company which transferred them to the trust.

The Trust Law explicitly separates the assets held by the trustee from joint or individual attachment by creditors of the trustee or by creditors of the transferee (the company or financial institution where the loans originated) except in the case of a fraudulent transfer (Trust Law, Art. 15). Only the creditors of the beneficiaries (holders of certificates of participation in, or debt securities guaranteed by, the trust assets) may exercise rights over the benefits originated in the assets and subordinate their rights thereto. On the other hand, the assets of the trustee will not be utilized to cover any obligations undertaken upon the establishment of the trust, which may only be covered with the assets placed in the trust.

Assets Not Reachable by Creditors

The assets held in trust will not be reachable by the creditors of the trustee nor by the creditors of the transferor company, except in the case of fraud (Trust

Law, Art. 15). Furthermore, the trustee's liability under its contractual obligations extends only to the assets held in trust and not any other assets of the trustee, and the trustee may not be declared bankrupt or in default if the assets held in trust are insufficient to meet all obligations under the trust agreement. In such case, the trustee shall, in accordance with the terms of the agreement, liquidate, foreclose upon or dispose of the assets transferred in trust and assign the remainder to the creditors according to privileges established by law (Trust Law, Art. 16). The trustee may transfer or establish a lien against the assets held in trust as required under the trust agreement, without the prior approval of the transferor or of the beneficiaries, unless otherwise agreed (Trust Law, Art. 17). Finally, the trustee is empowered to take all actions necessary to protect the assets transferred in trust, whether in relation to the beneficiaries or third parties; when the trustee has not taken actions required of it, the court may authorize the transferor or the beneficiaries to act in its place (Trust Law, Art. 18).

In the case of bankruptcy, an examination of cases under the bankruptcy code supports the analysis that there are no instances other than the case of fraud in which the transfer of assets or rights to the trustee may be challenged or may enter into bankruptcy proceedings against the trustee or the transferor. Under the Argentine bankruptcy code, the court will set a period of suspicion as existing prior to the request for bankruptcy, in which certain transfers may be set aside if, at the time of the transfer, it was reasonably evident that the entity (in this case the transferor company) was unable to pay its debts in a timely manner and, among other indicators, if the purchase price was not for fair value (Law No. 19,551, Art. 122). This period, fixed by the bankruptcy judge at no greater than two years before the declaration of bankruptcy, is determined by the court to have begun when the debtor has suspended its payment obligations (*cesación de pagos*). Article 86 of the bankruptcy code of Argentina indicates a number of criteria which the court may consider as evidence of the date upon which the debtor can be considered to have entered into such a suspension of payment obligations, in order to fix the date of the suspicion period, including delay in compliance with obligations, the closing of the administrative offices of the debtor, fraudulent transfers or the transfer of goods in payment of obligations or their sale at an unseemly price, and fraudulent attempts to obtain funds.

Meeting a Bankruptcy Court Challenge

To be certain that the transfer of the security interests in liens or Mortgage Notes would not be challenged by the bankruptcy court, the most important elements to be considered are (i) to demonstrate clearly that the transferor was not in a period of suspension of payments when the transfer took place, and (ii) that the transfer

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was not made for less than fair value (*precio vil*). In the first case, numerous cases and commentaries point to factors that should be objectively observable prior to the closing of the transfer to demonstrate non-entering into a suspension of payments period, including (a) facts that demonstrate the debtor's inability to meet its obligations on a regular basis;¹⁹ (b) observable evidence attesting unequivocally to the impossibility of the debtor to meet its obligations regularly;²⁰ or (c) a judicial order or sentence requiring that the debtor pay an amount owed.²¹ In the second case, that of a transfer for less than fair value, doctrine and case law suggest that the price of the sale would indicate a suspension of payments if it were a price far below its real value, with disproportionately low consideration paid in relation to the item sold, which would materially affect the net worth of the seller.²² In a particularly revealing case, although the party in bankruptcy had sold two real estate properties below 50 percent of their appraised value during the suspicion period, the court considered that the disproportionate cost could not be a reason for challenging the sales.²³

Judging by the standards utilized to define when a sale or transfer may be challenged by the courts in bankruptcy, it appears that there is sufficient latitude for the securitization process to function with a transfer of assets from the transferor to the trustee on terms that would resist challenge in the courts.

Conclusion

The recent promulgation of the Trust Law in Argentina presents an agile vehicle for the establishment of financial trusts which would be able to receive loan portfolios from a company or a financial institution and which could then issue debt or equity securities in the local and international marketplace exempt from certain Argentine taxes. This structure provides a simplified process for registering title in trust to the assets or rights securing the loans and insures that other creditors will not be able to challenge the loans transferred to the trust for the benefit of the holders of the securities in the international markets.

¹This article is for general informational purposes only.

²Law No. 24,441, published in the *Boletín Oficial* No. 28,061, January 16, 1995. The law was approved by Congress on December 22, 1994 and signed into law on January 9, 1995.

³This article focuses particularly on the cases of mortgage notes (*letras hipotecarias*) to be issued upon the signing of the mortgage, which offer an expedited foreclosure procedure, and chattel mortgages, such as automobile loans. We do not address other mechanisms by which a trust or a mutual fund (*fondo común de inversión*) may offer participation certificates in their investments, lease financing provisions, nor other changes to the Argentine civil code and other legislation or other new types of instruments envisioned under the Trust Law.

⁴Trust Law, Arts. 5 and 7. The CNV is currently drafting the regulatory requirements.

⁵Trust Law, Art. 19. Tax benefits on securities authorized for public offering in Argentina include exemptions from the value added tax, interest withholding tax, income and capital gains tax and other taxes.

⁶For instance, the procedure for transferring and registering title to automobiles to the trustee requires an endorsement by the transferor of the liens presently registered in its name, requiring the transferor and the trustee to sign a form instructing each registry where the property is registered (there are over 100 registries in the Buenos Aires region for automobiles) to endorse on its records the transfer of the liens by the transferor to the trustee. Each lien to be so transferred must be accurately referred to on such form, indicating the name, the amount of the lien and the new obligor (Trust Law, Art. 71). The lien thus transfers a priority in the security interest in the lien on each asset to the holder of the lien for a maximum period of five years, which may be continued beyond such period if the interest is registered again prior to its expiration (Law No. 12,962, Art. 23). While the transferor may be jointly and severally responsible with the original debtor for the payment of the credit secured by the lien (Law No. 12,962, Art. 23), it may also endorse over the lien without recourse (Law No. 5,965/63, Art. 16).

⁷For a description of the transfer of chattel mortgages to a trustee, see footnotes to section 2(b) above regarding the transfer of liens on automobiles.

⁸Trust Law, Art. 36 and 37. The Mortgage Notes are required to be issued at the moment of the constitution of the mortgage, which would imply also at the moment in which the dwelling being mortgaged is purchased. Such timing ensures that there will not exist any other claims against the debtor's interest in the dwelling or limitations against the possibility of executing the mortgage in the event of default by the debtor.

⁹Trust Law, Art. 38. In the case of sale or transfer, the new owner has a right to possession of the property behind the holders of the Mortgage Notes and in the case of rental, the rights of the holders of Mortgage Notes and Coupons may not be limited thereby. Id. If fire hazard insurance is not maintained on the property, the Mortgage Notes may be subject to foreclosure.

¹⁰Id.

¹¹Trust Law, Art. 42. Any changes in the place of payment must be by prior notification to the debtor. Id.

¹²Trust Law, Arts. 42 and 41. In the case that coupons are not utilized, the payments made by the debtor may be annotated on the Mortgage Note.

¹³Trust Law, Art. 45. When drafting Mortgage Notes, it will be necessary that the documentation for the closing of the mortgage contain an express agreement of submission by the debtor to the provisions of the special foreclosure procedures of Title V, which agreement must be noted on the Mortgage Notes and Coupons, if any.

Except as provided by the Trust Law, the foreclosure on mortgages will be governed by the portions of the Civil Code with respect to questions of property law. Trust Law, Art. 44. Enforcement of payment obligations on securities guaranteed by the mortgages shall be governed by the specific provisions of the Trust Law and by the rules under Decree Law No. 5965/63 (governing commercial paper) where such are not inconsistent with the Trust Law. Trust Law, Art. 46.

¹⁴Trust Law, Art. 45. The availability of summary judgment procedures must also be noted upon the Mortgage Notes and Coupons. See note 32, *supra*.

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¹⁵Trust Law, Art. 53. The debtor should also be notified that the extrajudicial foreclosure may occur.

¹⁶Trust Law, Art. 57, indicating that a licensed real estate broker must perform the auction and stipulating the type of public notification to be provided.

¹⁷Trust Law, Art. 21. Either type of security may be issued in various classes and in bearer, registered or book-entry format, whether global or not, and shall be issued pursuant to a prospectus describing the conditions of the issue and the various details regarding the trust agreement. Id.

¹⁸It should be noted that the Trust Law, especially the provisions regarding the issue of securities, is to be the subject of regulations by the CNV, which is currently considering proposed regulations.

¹⁹In re Transportes Apolo, S.R.L., quiebra, L.L. 1975-A-830, caso 703, J.A., 975-25-628.

²⁰Ajyle S.A., quiebra, L.L. XXXV-J-Z, 1417, sum. 25 - J.A. 975-27-290 - D, 61-401.

²¹See Helden, S.A., p/ quiebra a Sistemas de Publicidad, S.R.L., L.L. 1982-D, 27. See also s/Concurso civil Benigno L. Ucha, L.L. 1985-B, 470 and Peralta, Juan, L.L. 1979-C, 454.

²²CNCom., sala A, Mayo 28-987.-Empresaria, Soc., en Com. por ACcs., quiebra y otros, L.L. 1987-D, 564.

²³Ibid., p. 568-570. The fact that the buyer paid 49 percent and 43 percent of the value of the properties as assessed by a court-appointed appraiser was considered insufficient to demonstrate a fraudulent sale. □

As a consequence of national and Most Favored Nation treatment, and the fact that under the Argentine Constitution a treaty prevails over a law, U.S. investors will have access to some areas which remained restricted to foreign investors after the Economic Emergency Law was enacted in 1989. As an example, the Broadcasting Law states that a license can not be granted to a corporation controlled by a foreign company or be an affiliate or subsidiary of a foreign company, restricting acquisition to 49 percent ownership. Now, U.S. corporations in Argentina will be able to acquire 100 percent of companies holding broadcasting licenses (both TV and radio).

In addition, the treaty grants U.S. investors the right to international arbitration without having to submit disputes to local courts.

Scope

The treaty will remain in force for 10 years but will continue thereafter unless terminated with one year's prior notice by either of the countries. It applies to both

U.S. investors now will have access to some areas which remained off limits after the Economic Emergency Law was enacted in 1989.

U.S. Investment Treaty Takes Effect

By Adolfo Durañona

EXECUTIVE SUMMARY: U.S. investors are granted equal treatment and the right to international arbitration under a treaty which recently became effective.

In 1991, Argentina and the United States executed a treaty to encourage reciprocal investment. After various negotiations and amendments to the protocol, the treaty entered into effect on October 20, 1994.

Equal Treatment for U.S. Investors

The treaty complements Argentina's policy of encouraging foreign investment and competitiveness, and assuring U.S. investors that Argentina provides a stable environment. It states that each country must permit and treat investments and related activities of nationals or corporations of the other country as favorably as those of its own or those of third countries. This means that, except for certain areas excluded by the protocol, Argentina will grant U.S. investors the same treatment that it grants its own companies and nationals.

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investments made after it took effect and to existing investments.

The investments and associated activities covered under the treaty are broadly defined in Article 1. Investments range from tangible and intangible property (e.g., mortgages, liens and pledges) to intellectual property and related rights (e.g., industrial designs, trade secrets, confidential business information), shares or other interests in a company and, in general, any right granted by a law or contract related to an investment.

Associated activities include purchasing, operating, and selling companies and their related entities (e.g., branches, agencies, offices and factories), intellectual property and industrial property rights, contracts, borrowing funds and purchasing foreign exchange for imports.

The treaty, confirming Argentine foreign investment policy, establishes that the countries shall permit free and prompt transfer of funds. It eliminates performance requirements related to an investment (e.g., the requirement that some portion of products produced in Argentina be exported).

The treaty also obliges both countries to allow expatriates to enter and remain in the territory of the other country to set up a business, and to allow investing companies to engage top managerial personnel regardless of their nationality. These obligations do not represent a change in the Argentine immigration system since the

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