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- Shortly thereafter, Decree No. 1638/01 provided that those activities which enjoyed a specific exemption granted by law (i.e., the MIL) were not required to repatriate the proceeds of their exports into the country.
- In spite of this last Decree, after December, 2001, all mining companies had been effectively required to transfer the proceeds of their exports into the country and to sell such foreign currency in the local market.
- After several contradicting resolutions of different departments of the government, in February, 2003, Decree 417/03 was enacted, which provided that mining companies that were registered under the stability regime of the Mining Investment Law while Decree No. 530/91 was in force were not required to transfer to the country the proceeds of their mining exports. Uncertainty as to the treatment applicable to mining companies registered after December, 2001, was remaining.

Recent Decree 753/04

On June 17, 2004, Decree No. 753/04 was issued, which finally eliminates the obligation of mining companies to sell in the local market the proceeds of their exports. Such new regime is applicable to companies registered under the MIL (with respect to new mining projects or expansion of existing ones) as from the date this decree is in force (June 26, 2004).

Restrictions with respect to the free disposition of the funds deriving from financing contracted abroad are also repealed, provided such funds are applied to export mining projects.

With respect to mining companies registered under the MIL regime between December, 2001, and June, 2004 (date of this Decree), such would not enjoy the benefits of Decree No. 753/04. However, no company has been registered under the MIL regime during such period and thus no mining company is being affected.

Conclusion

Decree No. 753/04, which allows the majority of mining companies (i.e., those registered under the MIL regime) free disposition of export revenues, was a measure long awaited by the Argentine mining industry.

Viability of some of the major mining projects, which start-up has been recently announced, and of others of no less importance, was depending upon the existence of this regulation.

Therefore, the measure recently issued (together with the 30-year tax stability provided by the MIL) will strongly contribute to the development and financing of several of the mining projects currently existing in Argentina and demonstrates a strong commitment of the present administration with mining. ❑

Recognition of Argentine APEs in New York

by Fernando Muñoz de Toro and Fabián D'Aiello

[Editor's Note: A recent ruling by a U.S. bankruptcy court recognizes an Argentine procedure where a financially-distressed company can negotiate a work-out with creditors. Now Argentina needs to amend the law so that more Argentine companies can return to solvency.]

In a recent ruling ("Board of Directors of Multicanal S.A. in a Proceeding Under Section 304 of the Bankruptcy Code"), the United States Bankruptcy Court for the Southern District of New York recognized Argentine *acuerdos preventivos extrajudiciales* (APEs) as a valid proceeding to obtain relief in the U.S. under Section 304 of the Bankruptcy Code.

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Judge Allan Gropper conducted a thorough analysis of the APE and found not only that the APE qualifies as a "foreign proceeding" under Section 304 (and that the Board of Directors of the debtor qualifies as the "foreign representative" referred to in such Section), but also that it resembles the U.S.'s prepackaged reorganization plans

The Argentine APE provides a device by which financially-troubled companies can enter into out-of-court prepackaged restructuring agreements.

(Prepacks)[1] in many aspects, including, among others, the extent of their judicial oversight, the majorities requirements, and the possibility of forming creditors' committees. Moreover, unlike Prepacks, the APE requires the debtor to present certain information certified by public accountants and the stay triggered by its filing is more limited than in the case of a Prepack.

Such an important decision is likely to foster the future use of the APE, a quite new proceeding in Argen-

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tina. (Even though the APE was incorporated to the Argentine insolvency legislation in 1995, it only began to be extensively used as from 2002, following Argentina's financial crisis and devaluation of the Peso in December 2001/January 2002, which forced most Argentine companies to restructure their debts.) The decision also closes the circle of U.S. recognition for all Argentine insolvency legislation, since the *concurso preventivo*, a reorganization procedure similar to Chapter 11, was granted recognition under Section 304 in 2001, in a proceeding commenced by CGC, the oil company at that time controlled by the Soldati family.

Use of APE

The Argentine APE permits financially-troubled companies to enter into out-of-court prepackaged restructuring agreements with a qualified majority of its unsecured creditors (i.e., a majority of creditors representing at least two-thirds of the unsecured total debt). After judicial recognition of the agreement, the restructuring can then be crammed down dissenting creditors. This proceeding is intended to provide both debtors and creditors with a flexible and speedy way to complete a financial restructuring. The procedure permits creditors and debtors to avoid the bureaucratic Argentine judicial system and also to limit the actions of hold-outs that could block restructuring proposals accepted by the majority of creditors. The APE also provides a solution to issuers of bonds who, without such an instrument, would have no choice but to file for a *concurso*, since they could not obtain 100 percent acceptances for a consensual restructuring.

Given the current situation in Argentina and the urgent need for a definitive solution to the corporate debt restructuring, the APE (particularly after U.S. recognition) is expected to be increasingly used as a practical debt restructuring tool.

Further Changes Needed

However, while the recognition of the APE by a U.S. court is good news, there are still several aspects of the APE legislation that should be improved. The APE legislation is vague (only eight articles included in the Bankruptcy Law) and fails to regulate all aspects needed for the APE to become the flexible, useful instrument that it was designed to be and to guarantee legal certainty for debtors and creditors (as explained further, below). Additionally, the combination of the vague regulation and the absence of any significant precedents has caused delays in the judicial confirmation procedure of APEs.

The legislation that created the APEs needs to be amended to, among others: (a) exclude commercial creditors and tax debts from the APE (thus, avoiding systematic opposition to the APEs by the Argentine tax authorities); (b) clarify the amount of the court tax (a tax payable by persons filing a claim or proceeding with Argentine courts) applicable to the APE (i.e., it is not clear whether the tax is calculated based on the entire unsecured debt or only the portion of the debt that is crammed down); (c) establish clear voting procedures, particularly in the case of bondholders and the treatment of accrued and unpaid interest; (d) permit the classification of creditors into categories (such as secured, unsecured, labor claims) and permit the debtor to offer alternative proposals to different or within the same categories; and (e) clarify that the APE is complied with when the new debt instruments are delivered in exchange for the defaulted ones, and that a subsequent default under the new debt instruments issued to implement the restructuring (both in case of payment and technical defaults) would allow

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How Do APEs Work?

- A financially-troubled company begins negotiations to restructure its debt with some of its unsecured creditors (or a creditor's committee).
- If the debtor is unable to reach an agreement with 100 percent of the unsecured creditors (because there are hold-outs or because it has issued bonds and reaching unanimity is impossible), it can still avoid recourse to a *concurso preventivo* (a proceeding similar to a Chapter 11 reorganization) by filing for judicial confirmation of an APE, provided that a majority of unsecured creditors representing at least two-thirds of the unsecured total debt have agreed to support the APE.
- An automatic stay is imposed with the filing of an APE.
- The judge reviews whether the required majority has been obtained (based on a statement of assets and liabilities prepared by the debtor) and orders the publication of notices for creditors to present objections to the APE. Creditors may object only on the following grounds: statement of assets and liabilities was not accurate; the required majority was not obtained; or, the APE is fraudulent.
- Once confirmed by the judge, the APE binds all creditors affected by the APE, whether consenting or not.
- The APE may contemplate different or alternative proposals for creditors to choose from (including a proposal for dissenting creditors).
- In the case of an issuance of bonds, the obtaining of the majorities would often require a bondholders meeting to take place, where bondholders would vote in favor or against the APE.

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the debtor to file for a *concurso preventivo* instead of being automatically declared bankrupt.

Temporary Solutions to Procedural Shortcomings

Unfortunately, it may take some time before these changes are approved and implemented. In the meantime, there are things that could be done to permit Argentine companies to recover. For example, there are simple ways to avoid opposition to the APEs by the tax authorities in order to allow a more rapid confirmation of APEs (for example, by having the Federal Tax Authority (Administración Federal de Ingresos Públicos—AFIP) issue a resolution allowing the debtor filing an APE to expressly waive its right to apply the APE to the federal tax debts and allowing such debtor to present a payment proposal, as in the case of *concursos preventivos*). In addition, a package contemplating various temporary tax reforms designed to benefit debtors and creditors that agree to restructure debts privately, without recourse to the *concurso preventivo* or bankruptcy, was prepared by the private sector and proposed to the government.

After judicial recognition of the agreement, the restructuring can then be crammed down dissenting creditors.

Argentina is reaching the third anniversary of its worst economic crisis. Despite the numerous (and sometimes contradictory) measures adopted by the successive governments, still almost half of Argentine companies continue to be burdened by the combination of a dollar-denominated debt and income in "devaluated pesos." With its recognition in the U.S., the APE has moved a step forward. It is time to adopt emergency tax legislation that would grant debtors and creditors appropriate incentives to reach a rapid solution that would allow them to settle debts caused by the crisis and to permit companies to return to economic viability.

[1]Prepackaged bankruptcy, or "prepacks," describe a procedure which combines an informal workout with a Chapter 11 proceeding. A prepack permits a financially-distressed company to informally negotiate a reorganization plan with creditors. The company then files for bankruptcy under Chapter 11, and presents the court with the plan agreed by the creditors and debtor. Prepackaged bankruptcy permits the debtor to complete the bankruptcy process quickly. ❑

New Regulations for 2003 Tax Reform

by Leandro Passarella

On July 23, 2004, new regulations were released by the Executive Branch (New Regulations).[1] These New Regulations refer to transfer pricing and thin capitalization rules, which were amended in the last tax reform (2003 Tax Reform).

The 2003 Tax Reform amended various aspects of the Income Tax Law. Among these amendments were new rules on transfer pricing for commodity exporters, transaction disclosure requirements and thin capitalization. Last month's Income Tax Law regulations released by the Executive Branch provide further guidance on each of these topics.

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Commodity Exports

The 2003 Tax Reform specified rules to determine the best transfer pricing method for Argentine commodity exporters selling to foreign related intermediaries. Thus, the 2003 Tax Reform identified the "comparable uncontrolled price" method as the appropriate method to determine pricing for commodity exports to related brokers, i.e., buyers that are not the final export recipient.[2] The comparable uncontrolled price method sets the product's fair market value on the date of loading, unless the agreed-on export price is higher.

The New Regulations have fixed the determination of fair market value as of the date loading is "completed." This exposes the Argentine exporter to tax on phantom income if the agreed-on commodity price is lower than its fair market value at the time of loading. Nonetheless, the Argentine commodity exporter can avoid the presumptive "best method" imposed by the 2003 Tax Reform if it can prove on an annual basis that the foreign related broker meets three requirements simultaneously:

- it has a real presence in its country of residence, with material and human resources (a) sufficient to engage in brokerage activities and (b) commensurate with managed trade volumes;

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