



**THE APE:
Argentina's Prepackaged Debt Restructuring Agreement**

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This article describes the Acuerdo Preventivo Extrajudicial (APE) that is currently being implemented by most Argentine companies to restructure their debt.

Background

In December, 2001 the Argentine Peso, which had been pegged to the U.S. Dollar by the Convertibility Law for more the 10 years, was devalued. The devaluation was specially prejudicial to those companies that had their financial debt denominated in U.S. dollars or other foreign currencies, as in most cases those debts continued to be payable in such foreign currencies. If such indebted companies earned their revenues in Pesos through sales of their products or provision of their services to the Argentine market, the financial problem became greater and a debt restructuring became necessary to make ends meet.

Many laws and decrees were passed during the first half of the year 2002 to alleviate the crisis. Among these the Argentine Congress passed two laws amending the Argentine Bankruptcy Law 24,522 (ABL). The second of these laws, Law N° 25,589, passed on May 16, 2002, among other changes modified the main provisions governing the APE.

Acuerdo Preventivo Extrajudicial

The APE is an out-of-court debt restructuring agreement that is binding on all unsecured creditors of the debtor company, including those that did not consent to the APE, provided that: (i) the APE is signed by the majority of creditors provided by the ABL; and (ii) the court endorses or validates the signed APE (under the ABL, this court ruling is denominated an *homologación*, which basically consists of a judicial confirmation that the APE complies with the ABL legal requirements).

The effectiveness of the endorsed APE against all unsecured creditors is the key feature that makes the APE an attractive alternative to restructure debt. This feature was added to the APE by Law 25,589 on May 2002. Only after this amendment of the ABL did companies consider the implementation of an APE to restructure their indebtedness.

Several provisions applicable to *concursum preventivos* (the Argentine version of Chapter 11 under US Bankruptcy Law) apply expressly to the APE. However, the provisions of the ABL regulating the APE are drafted in broad terms and in some cases could be subject to different interpretations. Moreover, given that the amendment of the ABL is very recent, there are very few APEs that have been endorsed by an Argentine court. As case law is very scarce so far, there are several issues related to the APE that remain to be considered. Some of these open issues are discussed below.

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Content of the APE

The restructuring proposal generally comprises unsecured debt obligations. The ABL provides freedom of content of the APE. The debtor company and its creditors are free to structure the terms of the APE as they see fit. They may agree to any or all of the following: amendments, waivers, deferral of principal or interest payments, exchange of notes for new notes and/or equity, new guarantees, payments in cash or in kind, etc.

Required Majorities:

For the Argentine court endorsement to proceed, certain specified majorities of creditors must consent to the terms of the APE: (i) the absolute majority (more than 50%) of all unsecured creditors, determined on a per capita basis, each individual creditor being computed as “one”, regardless of the amount of their credit, (the “Per Cápita Majorities”), plus (ii) at least two thirds (2/3) of the aggregate principal amount of such unsecured creditors (the “Principal Majorities”, and together with the headcount majority, the “Required Majorities”).

Under the ABL, the Required Majorities will prevail over any majorities provided under the terms of any particular indebtedness that is restructured by the APE. For example, *obligaciones negociables* issued by a significant number of Argentine corporations, generally require a unanimous consent of all noteholders to modify essential terms of the same, such as maturity date or principal or interest amount payable. However, the Required Majorities would be sufficient to effectively modify the terms of those *obligaciones negociables* in the event these are included in a restructuring under an APE.

Bankruptcy specialists are debating the scope of unsecured credits that should be computed to determine compliance of the Required Majorities. Some specialists claim that all the unsecured credits should be computed. Others consider that the computed credits could be limited to unsecured credits that are outstanding and unpaid at the time of filing of the APE (excluding for example commercial credits that are being paid regularly), or by using other parameters. This remains an unsettled issue.

In the event the creditors hold debt instruments issued in series, a noteholders meeting should be called to obtain the consent of the holders of such notes. In the specific case of noteholders meetings, the ABL provides a peculiar mechanism to compute the per capita Majority. All votes in favor would be counted as one vote and all votes against also as one vote. For example, if 99 holders vote in favor of the APE and one holder vote against, the final Per Capita Majority result would be a deadlock of one-to one and the Required Majorities would not be obtained. This results in an absurd “veto power” granted by the ABL to non consenting holders, who may with their single vote block the approval of the APE by the holders meeting, harming not only the debtor but also those holders that intend to vote in favor of the APE.

Under the APE the credits may be classified in different categories. Credits of the same category should be offered the same restructuring terms. The creation of each category should be made following reasonable and non discriminatory guidelines. Some bankruptcy experts believe that in the event categories are created, each category should



approve the APE by Required Majorities computed on the basis of the credits that integrate each category. Other experts consider that in all cases the Required Majorities must be computed on an overall basis, regardless of the existence of categories.

Bankruptcy lawyers also differ in their understandings as to whether the “*cramdown power*” that applies to the *concurso preventivo* would also apply to the APE. The “*cramdown power*” would work as follows: in the event categories are created, and one of the categories were not approved by the Required Majorities, the APE could still be endorsed by the court provided that at least one category is approved by the Required Majorities and at least 75 percent of the total unsecured creditors approve the APE. In such case, those creditors that belong to the category that was not approved by the Required Majorities could chose to receive the same that was offered to any of the other categories.

APE Procedure

The APE procedure is generally commenced by the debtor by proposing a restructuring of its debts to its unsecured creditors to be entered into under an APE. The creditors may conduct negotiations through a steering committee, although the ABL does not require such a committee to be constituted.

The ABL requires the debtor to be insolvent or in general financial or economic difficulties to enter into an APE. This is a simple standard to meet that does not burden the debtor by requiring it to show evidence of its insolvency.

Any company can enter into an APE, with a few exceptions related to certain activities that are regulated by special insolvency rules (v.g.: banks and insurance companies).

During 2002 and 2003 some debtors conducted a tender offer of notes prior to the implementation of the APE. Under these tender offers, the debtor generally offers to purchase the notes of those holders that tendered their notes at a lower price following an “*inverse dutch auction*” procedure. The tender offer price is generally paid in cash. Given that any outstanding debt held by the debtor or by controlling shareholders of the debtor may not vote to consent and will not be computed when determining the majorities required to approve the APE, the debt which is repurchased is generally cancelled by the debtor.

The APE is generally executed in several separate instruments reflecting the same tenor and terms². The ABL provides that the APE is binding against the signing parties as of the date of execution. However, a carefully drafted APE would typically require the compliance of several conditions prior to effectiveness, including among others the court endorsement of the APE.

Once the Required Majorities are obtained, the APE is filed with the court together with a dossier of documentation referring to the financial situation of the debtor, including among others: (i) an assets and liabilities statement, (ii) a list of

² The signature of the parties or their proxies should be certified by notary public. If the APE is executed abroad, to be enforceable in Argentina it should be authenticated by an apostille under the Hague Convention procedure or other available authentication procedures.



creditors, (iii) a list of pending lawsuits and administrative procedures against the debtor, (iv) the amount of existing indebtedness held by creditors that have executed the APE and the percentage they represent with respect to the total registered debt.

The filing of the APE before the relevant court has the effect of staying all actions to enforce unsecured claims against the debtor. However, it does not suspend the accrual of interest on outstanding debt.

The court will conduct a review of the compliance of the Required Majorities and other formal requirements, and a limited review of the substantive terms of the APE (for example, to determine that basic standards of Argentine law have not been breached, such as compliance of public order regulations, non existence of fraud, etc. or that the proposal does not discriminate creditors on unreasonable grounds).

The Court will subsequently order the publication of notices of the filing of the APE in the Official Gazette and in an Argentine newspaper of major circulation for five Argentine business days. Non-consenting creditors have ten business days to contest the APE on very limited grounds, such as omissions or exaggerations of the assets or liabilities, non compliance of the Required Majorities, or non compliance of the other formal or substantive requirements mentioned in the prior paragraph. If any creditor contests the APE, the court may order a ten days period to file evidence and would be required to rule on the matter within the following ten days.

Once the oppositions, if any, have been resolved, and the compliance of the Required Majorities and other legal requirements have been verified, the court should endorse the APE.

Upon court endorsement, the APE becomes effective against all unsecured creditors, including those that did not consent to the APE.

The Court Approval process should take between three months and one year, depending on the volume and nature of debt being renegotiated, the size of the debtor and the existence of oppositions. The proceeding could eventually take longer if the court endorsement order is appealed and the case is required to be considered by the Court of Appeals and eventually by the Supreme Court, if applicable.

During the following six months after the endorsement of the APE, the APE may be declared null and void upon the petition of a claimant that files evidence showing that the debtor intentionally exaggerated the assets or liabilities or hid assets, and such wrongdoing was discovered only after the ten day opposition period lapsed.

Advantages and Disadvantages of the APE

The APE provides the following advantages:

- Once endorsed by the court, it becomes effective against all unsecured creditors.
- Upon filing of the APE before the Court, all claims of unsecured creditors against the debtor are stayed..



- The APE is much faster and cheaper than a *concurso preventivo* and upon endorsement achieves the same effects.
- The APE may be used to implement a wide variety of restructuring alternatives as the ABL provides significant freedom of content of the APE.
- The Required Majorities of the APE are the same majorities that are required to approve a restructuring agreement reached in court through a “*concurso preventivo*”
- The threat of a “*concurso preventivo*” may make the debtor and the creditors eager to reach an agreement under an APE.
- The debtor is not required to show evidence of insolvency to enter into an APE.
- The APE reduces the scope of action of potential “*holdouts*”. All unsecured creditors would be aware that they will not be able to obtain a better deal than the one that was offered to the majority of the creditors, and therefore there are no incentives to withdraw from the mainstream negotiations with the debtor. Likewise, once the APE is endorsed, the non consenting creditor would not be able to file a judicial claim either.
- The negative impact on the reputation and image of the debtor is lower than in the case of a *concurso preventivo*. A debtor that files a *concurso preventivo* is generally viewed as suffering a significantly worse financial and economic condition than a debtor that enters into a debt restructuring through an APE, as the APE is a “*friendlier*” form of debt restructuring both from the perspective of the debtor and the creditors.
- If the debtor is an economic group, two or more companies of the group could simultaneously enter into an APE.
- Unlike the “*concurso preventivo*”, under the APE the debtor completely preserves the management of the company, without judicial intervention or supervision.
- The *concurso preventivo* may result in a hostile takeover if the required majorities are not obtained during the exclusivity period provided in the ABL. This takeover risk is avoided by implementing an APE.

But there are also disadvantages of the APE, including the following:

- Lack of judicial protection of the debtor during the period the debtor is soliciting consents prior to court filing.
- The filing of the APE does not suspend the accrual of interests (unlike the “*concurso preventivo*”).
- The main disadvantage is the existence of uncertainty regarding certain issues related to the APE, some of which have been mentioned herein. Nevertheless, we expect that these uncertainties should gradually be resolved through improvement of existing legislation and clarifications through court decisions.