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## SECOND CIRCUIT HOLDS U.S. CREDITORS ARE BOUND BY RULING IN ARGENTINE BANKRUPTCY CASE

On May 29, 2008, the Second Circuit decided the case of *In re Board of Directors of Telecom Argentina, S.A.*, Docket No. 06-5640-bk (2d Cir. May 29, 2008), in which the Court affirmed the district court's and thereby the earlier bankruptcy court's recognition of the restructuring plan and the extension of comity to an Argentine insolvency proceeding under former section 304 of the Bankruptcy Code.

Telecom Argentina, S.A. ("Telecom Argentina") and its creditors entered into a privately negotiated debt restructuring plan (*acuerdo preventivo extrajudicial*) under the Argentine Insolvency and Bankruptcy Law (the "APE") that was approved by 82.2% of the noteholders holding 94.4% of the face amount of the notes.

Appellant, The Argo Fund, Ltd. ("Argo"), which had purchased over \$35 million in notes after Telecom Argentina had defaulted, did not participate in the Argentine APE although it had been aware of the pendency of the proceedings. Before the APE restructuring was closed, Argo contacted the indenture trustee for the old notes and instructed it not to exchange Argo's old notes for the new notes to be issued under the APE. The indenture trustee informed Telecom Argentina that it would not exchange the notes unless ordered to do so by a U.S. court.

Telecom Argentina then filed a petition in the United States Bankruptcy Court for the Southern District of New York, under former section 304 of the Bankruptcy Code, seeking a judgment declaring that the APE should be given full force and effect in the United States, and should be binding on all creditors, including Argo. After Argo's attempt to withdraw the reference failed, Bankruptcy Judge Burton R. Liffand granted the petition under section 304.

Argo appealed the Bankruptcy Court's ruling and the District Court affirmed the Bankruptcy Court's order and denied Argo's objections to the APE on *res judicata* grounds, finding that Argo could have raised the issue in the Argentine Courts. The District Court also found that recognition of the APE did not violate U.S. public policy considerations set forth in the Trust Indenture Act (TIA) and satisfied the best-interest test under Section 1129(a)(7) and the good faith requirement under Section 1129(a)(3) of the Bankruptcy Code.

On appeal, the Second Circuit found that Argo had notice of the APE proceedings throughout the process and had the opportunity to submit objections to the APE. The Court also found that, since the Trust Indenture Act cannot prevent the reorganization of a debtor under U.S. bankruptcy laws, and since section 304 is a part of U.S. bankruptcy law, a bankruptcy court may grant enforcement of foreign insolvency proceedings that restructure TIA bonds so long as recognition of the proceedings is otherwise valid under former section 304.

In response to Argo's argument that the Argentine APE did not provide the required protections of the best-interest test under Section 1129(a)(7) and the good faith requirement under Section 1129(a)(3) of the Bankruptcy Code, the Second Circuit concluded that, so long as all of the other 304(c) factors are

satisfied, the statute does not require that the distribution in a foreign insolvency proceeding be equal to the hypothetical amount the creditor would receive in a proceeding under U.S. law.

In affirming the district court's and the earlier bankruptcy court's recognition of the APE, the Second Circuit found no evidence that Telecom Argentina abused the APE process or entered into it in a bad faith attempt to press a debt restructuring it knew was unnecessary and stated that Argo's challenge in U.S. courts, after it refused to participate in the Argentine proceedings, is contrary to U.S. courts' "longstanding recognition that foreign courts have an interest in conducting insolvency proceedings concerning their own domestic business entities . . . and that creditors of an insolvency foreign corporation may be required to assert their claims against a foreign bankrupt before a duly convened bankruptcy tribunal."



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