

INSIDE THE MINDS™

BANKRUPTCY LAW CLIENT STRATEGIES IN SOUTH AMERICA

LEADING LAWYERS ON NAVIGATING THE SOUTH
AMERICAN BANKRUPTCY PROCESS, WORKING WITH LOCAL
GOVERNMENTS, AND DEVELOPING SUCCESSFUL STRATEGIES



ASPATORE

Julio César Rivera, Julio César Rivera - Abogados

Luiz Fernando Valente de Paiva, Pinheiro Neto Advogados

Juan García Montúfar, Rubio Leguía Normand; Tomás M. Araya, M. & M. Bomchil

Diego Peralta, Carey y Cia. Limitada; Fernando Aguirre B., Bufete Aguirre Soc. Civ.

Carlos Augusto Behrendorf Derraik, Derraik Advogados

Pablo R. Di Iorio, Quattrini, Laprida & Asociados

Alexandre Couto Silva, Barbosa, Müssnich & Aragão Advogados

I N S I D E T H E M I N D S

Bankruptcy Law Client Strategies in South America

*Leading Lawyers on Navigating the South American
Bankruptcy Process, Working with Local
Governments, and Developing Successful Strategies*



ASPATORE

©2011 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

Inside the Minds Project Manager, Tiffany Smith; edited by Michaela Falls; proofread by Melanie Zimmerman

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid-free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

Aspatore books may be purchased for educational, business, or sales promotional use. For information, please e-mail West.customer.service@thomson.com.

ISBN 978-0-314-27484-7

For corrections, updates, comments or any other inquiries please e-mail
TLR.AspatoreEditorial@thomson.com.

First Printing, 2011

10 9 8 7 6 5 4 3 2 1

Mat #41127480

CONTENTS

Julio César Rivera <i>Managing Partner, Julio César Rivera - Abogados</i> CORE CONCEPTS FOR ARGENTINEAN BANKRUPTCY LAW	7
Luiz Fernando Valente de Paiva <i>Partner and Chair, Restructuring and Bankruptcy Group, Pinheiro Neto Advogados</i> UNDERSTANDING THE INTRICACIES OF BRAZILIAN BANKRUPTCY LAW	21
Juan García Montúfar <i>Partner, Rubio Leguía Normand</i> THE CREDITOR-FRIENDLY BANKRUPTCY LAWS AND PRACTICES IN PERU	57
Tomás M. Araya <i>Partner, M. & M. Bomchil</i> CORPORATE BANKRUPTCY IN ARGENTINA	71
Diego Peralta <i>Partner, Carey y Cia. Limitada</i> OPTIONS, PROTECTIONS, AND CHANGES IN CHILEAN BANKRUPTCY LAW	109
Fernando Aguirre B. <i>Senior Partner, Bufete Aguirre Soc. Civ.</i> REPRESENTING BANKRUPTCY CLIENTS IN BOLIVIA	133
Carlos Augusto Behrendorf Derraik <i>Partner, Derraik Advogados in association with Squire, Sanders & Dempsey</i> BANKRUPTCY LAW IN BRAZIL: AN OVERVIEW AND PRACTICAL CONSIDERATIONS	151

Pablo R. Di Iorio	163
<i>Partner, Quattrini, Laprida & Asociados</i>	
<i>RECENT CHANGES AND TACTICS: THE PRACTICE OF BANKRUPTCY IN ARGENTINA</i>	
 Alexandre Couto Silva	 175
<i>Partner, Barbosa, Müssnich & Aragão Advogados</i>	
<i>COMPLYING WITH THE CHANGING ENVIRONMENT OF BRAZILIAN BANKRUPTCY LAW</i>	
 Appendices	 201

INSIDE THE MINDS™

BANKRUPTCY LAW CLIENT STRATEGIES IN SOUTH AMERICA

LEADING LAWYERS ON NAVIGATING THE SOUTH
AMERICAN BANKRUPTCY PROCESS, WORKING WITH LOCAL
GOVERNMENTS, AND DEVELOPING SUCCESSFUL STRATEGIES



ASPATORE

Julio César Rivera, Julio César Rivera - Abogados

Luiz Fernando Valente de Paiva, Pinheiro Neto Advogados

Juan García Montúfar, Rubio Leguía Normand; Tomás M. Araya, M. & M. Bomchil

Diego Peralta, Carey y Cia. Limitada; Fernando Aguirre B., Bufete Aguirre Soc. Civ.

Carlos Augusto Behrendorf Derraik, Derraik Advogados

Pablo R. Di Iorio, Quattrini, Laprida & Asociados

Alexandre Couto Silva, Barbosa, Müssnich & Aragão Advogados

AN INSIDE PERSPECTIVE ON SOUTH AMERICAN BANKRUPTCY LAW

Bankruptcy Law Client Strategies in South America provides an authoritative, insider's perspective on the intricacies of the South American commercial bankruptcy system. Featuring partners representing law firms across various countries in South America, including Argentina, Brazil, Peru, Chile, and Bolivia, this book guides the reader through the available options for bankruptcy clients, including reorganization, liquidation, and out-of-court proceedings. These top lawyers discuss how to create and implement an effective bankruptcy strategy, with details on tailoring the strategy to fit a client's situation, negotiating with creditors and trustees, protecting a client's assets, and overcoming common hurdles. These experienced authors also provide proven advice for working in an international environment and collaborating with foreign officials, companies, banks, and multi-national providers. Additionally, these leaders analyze recent and proposed changes to the bankruptcy laws, the impact of the economy on this practice area, and the latest trends affecting both lawyers and clients. The different niches represented and the breadth of perspectives presented enable readers to get inside some of the great legal minds of today, as these experienced lawyers offer up their thoughts on the keys to success within this dynamic field.

ABOUT INSIDE THE MINDS:

Inside the Minds provides readers with proven business intelligence from C-Level executives and lawyers (Chairman, CEO, CFO, CMO) of leading companies and firms nationwide. Each chapter is a first-hand perspective and is a future-oriented look at where the industry is going and the most important issues for the future. It is a unique insight into their experience and C-level standing within the industry.

9780314274847 法律



9 780314 274847

RMB: 681

2013-01-28

1 库

F0203



ASPATORE

www.west.thomson.com/aspatore

ISBN 978-0-314-27484-7



9 780314 274847

59000



I N S I D E T H E M I N D S

Bankruptcy Law Client Strategies in South America

*Leading Lawyers on Navigating the South American
Bankruptcy Process, Working with Local
Governments, and Developing Successful Strategies*



ASPATORE

©2011 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

Inside the Minds Project Manager, Tiffany Smith; edited by Michaela Falls; proofread by Melanie Zimmerman

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid-free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

Aspatore books may be purchased for educational, business, or sales promotional use. For information, please e-mail West.customer.service@thomson.com.

ISBN 978-0-314-27484-7

For corrections, updates, comments or any other inquiries please e-mail
TLR.AspatoreEditorial@thomson.com.

First Printing, 2011

10 9 8 7 6 5 4 3 2 1

Mat #41127480

CONTENTS

Julio César Rivera <i>Managing Partner, Julio César Rivera - Abogados</i> CORE CONCEPTS FOR ARGENTINEAN BANKRUPTCY LAW	7
Luiz Fernando Valente de Paiva <i>Partner and Chair, Restructuring and Bankruptcy Group, Pinheiro Neto Advogados</i> UNDERSTANDING THE INTRICACIES OF BRAZILIAN BANKRUPTCY LAW	21
Juan García Montúfar <i>Partner, Rubio Leguía Normand</i> THE CREDITOR-FRIENDLY BANKRUPTCY LAWS AND PRACTICES IN PERU	57
Tomás M. Araya <i>Partner, M. & M. Bomchil</i> CORPORATE BANKRUPTCY IN ARGENTINA	71
Diego Peralta <i>Partner, Carey y Cia. Limitada</i> OPTIONS, PROTECTIONS, AND CHANGES IN CHILEAN BANKRUPTCY LAW	109
Fernando Aguirre B. <i>Senior Partner, Bufete Aguirre Soc. Civ.</i> REPRESENTING BANKRUPTCY CLIENTS IN BOLIVIA	133
Carlos Augusto Behrendsdorf Derraik <i>Partner, Derraik Advogados in association with Squire, Sanders & Dempsey</i> BANKRUPTCY LAW IN BRAZIL: AN OVERVIEW AND PRACTICAL CONSIDERATIONS	151

Pablo R. Di Iorio	163
<i>Partner, Quattrini, Laprida & Asociados</i>	
<i>RECENT CHANGES AND TACTICS: THE PRACTICE OF BANKRUPTCY IN ARGENTINA</i>	
 Alexandre Couto Silva	 175
<i>Partner, Barbosa, Müssnich & Aragão Advogados</i>	
<i>COMPLYING WITH THE CHANGING ENVIRONMENT OF BRAZILIAN BANKRUPTCY LAW</i>	
 Appendices	 201

Core Concepts for Argentinean Bankruptcy Law

Julio César Rivera

Managing Partner

Julio César Rivera - Abogados



ASPATORE

Introduction

My practice focuses on bankruptcy, complex commercial litigation, and international commercial arbitration. Our clients are large and medium-sized Argentinean companies, as well as foreign creditors, indenture trustees, and foreign and national banks.

My practice is unique, in part, because of my experience. I have served as a first instance judge in commercial matters and as a member of the Commercial Court of Appeal in the city of Buenos Aires (*Juez de la Cámara de Apelaciones en lo Comercial*—this court has jurisdiction in bankruptcy matters). I have also taught insolvency law at undergraduate and graduate levels and have published several books and articles on insolvency and bankruptcy.

In 1995, I was appointed and worked in the parliamentary commission for the draft of the current Bankruptcy Law No 24,522. Later, in 2002, I prepared the draft for a reform, which became Law No 25,589, introducing the *Acuerdo Preventivo Extrajudicial* (APE) procedure. APE is a form of pre-pack procedure through which most major Argentine companies restructured their debt after the 2002 economic crisis.

Since 1985, I have practiced as a bankruptcy attorney, working at *Estudio Alegria* for ten years and my own practice since 1995. I have represented debtors in insolvency proceedings, trustees and receivers appointed in significant proceedings, and national and foreign creditors in several cases. I have also been called as expert witness on Argentine law in cases before the Court of the Southern District of New York and in Miami.

Discovering Argentina Bankruptcy Law

Bankruptcy law in Argentina is inspired from Italian law and is driven by two procedures: a Reorganization Procedure (*Concurso Preventivo*) that is equivalent to the US Bankruptcy Code Chapter 11, and a Bankruptcy Procedure that is equivalent to the US Bankruptcy Code Chapter 7. In 2002, Law 25, 589 introduced APE, a procedure inspired in the pre-pack agreements authorized by US courts. There are no other significant differences with the principal legal systems in the Western world.

However, a unique Argentine characteristic is that in real life, bankruptcy law is applied liberally. For example, while in Mexico there might be fewer than one hundred proceedings opened each six months, Argentina courts will see dozens of cases opened each week in the city of Buenos Aires. Other important urban centers (Rosario, Mendoza, Córdoba, etc.) process a significant number of cases as well.

Core Principles of Argentina Bankruptcy Law

Bankruptcy law in Argentina is relatively stable. Changes have been introduced in consonance with economic crises or changes in political philosophy. The history of the law is relatively recent: the 1889 Commercial Code was followed by the 1902 law, which was updated in 1933 and 1972. The current law was enacted in 1995, and it follows the structure of the 1972 Act. In 2002, due to a systemic economic crisis in Argentina, changes were enacted to address the threat. Further changes that enhance protection for labor union rights are expected. The fundamental principles of bankruptcy law in Argentina are:

1. Preservation of the company, which is reflected in laws favoring preventive solutions over liquidation procedures
2. Credit protection, which assures creditor participation in the approval of restructuring plans presented by the debtor and requires a majority of creditors to approve the plans
3. Approval by a court that will ensure proceedings are not abusive or constitute fraud against debtors
4. A procedure directed by a judge and a trustee or receiver is appointed by the judge
5. Special protection for credits caused in employment relationships
6. Unity of insolvency procedures: any person or corporation may invoke the protection of bankruptcy law, with the exception of banks and insurance companies that have different regimes.

Recent Changes to Argentina Bankruptcy Law

The 2002 reforms produced significant changes. Major companies have avoided the reorganization procedure and have opted for APE. Another significant change is that assets have been taken by worker cooperatives

that attempt to continue the companies' activities. This has been supported by the national and provincial governments through the enactment of expropriation laws that transfer assets to cooperatives. Certain factories were occupied by workers who started behaving like owners (*Zanón, Brukman*, and other cases), and despite the resistance from shareholders and creditors, the situation followed said course. That caused provincial governments to expropriate the assets to give them to the workers, and in practice, this has turned into a trap for creditors as the states are not paying the indemnities.

These changes occurred, primarily, because the 2002 systemic crisis was exceptional. There was a forecast that suggested that by the end of 2002, all Argentine companies would be in default if they were indebted in foreign currencies and their obligations in the internal market were *pesificadas* (converted to pesos). At the same time, prices of public services provided by foreign or national companies that acquired them during the privatization process in the 1990s were frozen. Therefore, it was necessary to provide a more agile and cost-effective mechanism than reorganization, and APE proved to be an effective tool. Late legislative changes were drafted under pressure and without much deliberation. In early 2002, a modification to the Bankruptcy Law over protecting national debtors was enacted. The International Monetary Fund (IMF) criticized the reform, causing its quick substitution with Law 25,589 as a counter reform.

Relevant Cases

In recent years, the relevant cases related to the new bankruptcy laws are *Sociedad Comercial del Plata S.A* (CSN, 20.10.09, *Fallos* 332:2339); *Supercanal S.A* (CNCom., sala A, 30.10.09, LL 2010-B, 366); *Multicanal S.A s/ acuerdo preventivo extrajudicial* (CNCom., sala A, 4.10.04, *Sup.CyQ*, La Ley, 2004 (noviembre), 49); *Arangel Maggio* (CSN, 15.03.07, *Fallos* 330:834); and *Telearte S.A* (Juzgado Nacional de 1a Instancia en lo Comercial Nro. 16, 7.03.06, LL 2006-C, 367).

These cases are relevant because they established limits to the reorganization plans (*acuerdo preventivo*) under the "abuse" (*abuso del derecho*) standard, and recognized the application of the due process standard and good faith standards to all the steps of the "*concurso preventivo*." The general

idea is to protect the right of creditors to participate in the acceptance or rejection of the agreement proposed by the debtor, which must ensure fair and equitable treatment to all creditors. That is to say that these cases develop a novel idea in Argentine law.

Economic and Globalization: Impact on Bankruptcy in Argentina

The 2002 crisis generated a significant increase in reorganization proceedings and some cases that leveraged APE, which were fewer in number but involved larger liability levels. It is estimated that over US\$1 billion in assets were restructured using this procedure. Globalization has caused the introduction of some new forms of contracts (such as, for example, the case of the *trust* called *fideicomiso* in Argentine law), but it has not affected bankruptcy law. In 2002, a legislative draft for the incorporation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency was presented to Congress but was not approved.

Developing Client Strategies

Reorganization, APE, and bankruptcy are the most common forms of bankruptcy-related actions in Argentina. Reorganization is equivalent to the US Bankruptcy Code Ch. 11 procedure. APE is a procedure that seeks to propose an agreement with creditors ultimately to be approved by a judge. Bankruptcy is a liquidation procedure.

APE is recommended because of the time and cost savings it represents. Additionally, if the procedure fails, it does not cause the bankruptcy of the debtor. Even in other proceedings, a fundamental principle of Argentine law is to preserve the entity, find preventive solutions, and protect employment.

Fitting Strategy to the Client's Situation

The strategy depends on the nature of the client's problems. APE or reorganization procedures suit cases in which there is financial debt and banks are creditors. However, many companies have debt caused in employment relationships and taxes, for which reorganization is less

effective—e.g., a company undergoing reorganization could be paralyzed by direct action of its workers, as is today the case of Paraná Metal SA. Workers often resort to strikes in these situations. In the case of tax credits, there is regulation (AFIP -Federal Tax Office- General Resolution 970) which limits payment plan possibilities for tax debt and has a large influence on liabilities. The law provides an automatic stay and the company continues to be managed by its shareholders and directors. A trustee controls the management and some disposition acts must be authorized by the judge. A creditors' committee has control and information faculties, but in practice, it has little significance. Section 20 of the National Constitution guarantees the same rights to foreign persons as to national persons, and this applies to legal entities as well. Any form of corporation, whether national or foreign, that has assets in Argentina may request the protection of bankruptcy law.

Complications Arising from Privileged Creditors

Companies undergoing reorganization achieve plan approval nearly every time. Whether the plan is fulfilled is a different matter. A large number of companies end up in liquidation because they do not fulfill the agreement with its creditors. Creditors such as tax authorities or employees hold privileged credits. Their influence affects both the plan approval for unsecured creditors and the real solution, not just the legal, to the economic problems of the company.

In Argentina, there is no culture of negotiation with employees at a time of crisis. The accepted principle is that employees are insulated from risks incurred by the company and therefore are not willing to accept layoffs, salary reductions, or changes in work conditions. Unions are creditors because of employer contributions calculated on the salaries of the employees. Sometimes the union will accept deferred payment plans, but they typically demand the solution to include both unsecured and privileged credits.

Benchmarks for Success

In reorganization and APE procedures, negotiations are performed face to face with each individual creditor. They do not, typically, act organically or