Chapter

Argentina

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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller, (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a receivable "contract" be deemed to exist as a result of the behaviour of the parties?

In general it is not necessary for the sale of goods and services to be enforceable, that they be instrumented under a specific form required by law. In Argentine law, the principle of freedom of forms governs. However, contracts above a certain value have to be instrumented in writing. Additionally, certain goods exist whose sale must be evidenced by certain formalities. Invoices can constitute evidence of a contract. It is also possible to infer the existence of a contract based upon a historic relationship between determined parties. For such purposes, invoices constitute one of the relevant elements for determining the presence of a contractual relationship.

1.2 Consumer Protections. Do Argentina's laws (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

Except for certain operations (e.g., credits deriving from the use of credit cards), Argentine laws do not fix limits to the interest rates agreed upon by the parties to a contract. Certain court rulings have admitted that grossly out of market interest rates were usurious, and reduced them *ex-officio*. Argentine legislation envisages the right of all creditors to claim indemnification due to late payment; in particular, in the case of obligations to deliver sums of money, the indemnification owed by the defaulting debtor is the payment of interest.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

In principle, the contracts utilised for such purposes will be those existing under private law but formalities required by specific rules of administrative law may exist. Likewise, the enforcement of contracts may be conditioned to compliance with certain prior requirements.

2 Choice of Law - Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in Argentina that will determine the governing law of the contract?

The governing law will be determined in the first place by the applicable international treaty. If no international treaty is applicable, the Argentine Civil Code will apply. In general terms, the main regulations are: (i) sections 1,209 and 1,210, which set forth that the contract will be governed by the laws of the place of performance of the (characteristic) obligation; and (ii) section 1,205 that sets forth that the applicable laws will be those of the place of execution of the contract. The rule varies if the receivable is in connection with the sale of (i) movable assets (personal property) with a permanent situation in Argentina and with no intent of transport abroad, and (ii) real estate, which in both cases shall be governed by Argentine law.

2.2 Base Case. If the seller and the obligor are both resident in Argentina, and the transactions giving rise to the receivables and the payment of the receivables take place in Argentina, and the seller and the obligor choose the law of Argentina to govern the receivables contract, is there any reason why a court in Argentina would not give effect to their choice of law?

No, there is not.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Argentina but the obligor is not, or if the obligor is resident in Argentina but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in Argentina give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

Under Argentine conflict of law rules, the seller and the obligor are free to choose the law which will govern the receivable, provided there is a reasonable connection between the parties or the

receivable contract and the law chosen. For instance, such connection may arise from the place in which obligations will be performed, the place in which the receivable contract is executed, the domicile of one or more of the parties, etc. There are limitations to the recognition of foreign law based on Argentine international public policy. This concept is applied to the case in a *posteriori* basis (i.e. it is not a fixed set of rules which the chosen law must abide by, but certain core principles which the chosen law must not violate, and said violation or lack thereof is determined by a judge after analysing the case, the principles, and the solution granted by the chosen law). It is important to point out there are not many case law precedents where a judge has ruled that certain laws are in violation of Argentina's international public policy, and there are even fewer cases where said violation was determined due to the choice of law in a commercial contract. This notwithstanding, there is a tendency to acknowledge certain principles which operate *a priori* and are thus inflexible rules which are applicable no matter what law the parties have chosen. Said rules are also known as "immediate application norms" due to the aforementioned fact that they are applicable even if the parties have chosen a different law to govern the contract. However, these fixed rules only apply to certain specific cases (for example, corporations incorporated abroad which carry out their main business activities in the country).

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in Argentina?

The United Nations Convention on Contracts for the International Sale of Goods and the Protocol to Amend the Convention on the Limitation Period in the International Sale of Goods, both signed in Vienna on 11 April 1980, were ratified by Argentina on 19 July 1983 through Law 22,765. These rules became effective on 1 January 1988.

3 Choice of Law - Receivables Purchase Agreement

3.1 Base Case. Does Argentina's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., Argentina's laws or foreign laws)?

There is no specific rule, and therefore there is freedom to agree.

3.2 Example 1: If (a) the seller and the obligor are located in Argentina, (b) the receivable is governed by the law of Argentina, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Argentina to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Argentina, will a court in Argentina recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

The domicile of the seller is one of the usual connections used by the Argentine conflict of law rules, therefore, if the seller resides in Argentina, an Argentine court would probably consider that as a reasonable connection giving effect to the choice of the law of the seller's country for these kinds of commercial relations and that sale would be effective against the seller (subject to some formalities detailed in question 4.2). Bankruptcy law provisions regarding rights of creditors should be taken into account, as well as provisions relating to reciprocity in case of bankruptcy (Argentine bankruptcy law sets forth that foreign creditors shall only be allowed to present themselves in the bankruptcy proceedings in Argentina and file a claim for their outstanding credit (the credit of which is payable abroad) before the Argentine judge if, likewise, the laws of the country of said foreign creditor would allow an Argentine creditor to file a claim for his or her outstanding credit (payable in Argentina) in any bankruptcy proceedings in said foreign country).

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside Argentina, will a court in Argentina recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?

See the answer to question 3.2.

3.4 Example 3: If (a) the seller is located in Argentina but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in Argentina recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with Argentina's own sale requirements?

Under Argentine conflict of law rules, the seller, the obligor and the purchaser are free to choose the law which will govern their commercial relation provided there is a reasonable connection between the case and the law chosen. If the election is valid and the sale has been legally perfected under foreign laws, an Argentine court would recognise that sale as being effective provided that principles of Argentine international public policy are not violated. In case of bankruptcy, law provisions regarding rights of creditors should be taken into account, as well as provisions related to reciprocity in case of bankruptcy.

3.5 Example 4: If (a) the obligor is located in Argentina but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in Argentina recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with Argentina's own sale requirements?

If the applicable law was validly chosen, as mentioned in the previous answer (i.e. that there was a reasonable connection between the obligor and the seller, and between the seller and the purchaser to choose in their relations the laws of the seller), and provided that Argentina's international public policy was not violated, an Argentine court will recognise that sale as being effective against the obligor. Bankruptcy law provisions regarding

rights of creditors should be taken into account, as well as provisions related to reciprocity in case of bankruptcy.

3.6 Example 5: If (a) the seller is located in Argentina (irrespective of the obligor's location), (b) the receivable is governed by the law of Argentina, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in Argentina recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in Argentina and any third party creditor or insolvency administrator of any such obligor)?

See the answer to question 3.4.

4 Asset Sales

4.1 Sale Methods Generally. In Argentina what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology - is it called a sale, transfer, assignment or something else?

The customary method will be an assignment contract, listing the sold receivables and the names and domiciles of the debtors thereunder. When the receivable is under litigation, a sale of real estate, a credit secured with real estate or originally documented in a public deed, the purchase agreement will need to be documented in a public deed in order to be effective. For securitisation purposes, receivables are usually assigned to a trust (under Argentine law - trust), and the property of such receivables segregated from other property of the trustee. See the response to question 7.2. The customary terminology is "assignment".

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

The sale of receivables is legally effective between the purchaser and seller upon the execution of the assignment agreement and with the delivery of the receivable contracts to the purchaser or a custodian (for instance, the seller). However, as a general principle, for the sale of any receivable (except for the ones specified below in this questionnaire), the law requires prior written notice to the debtor of such assignment in order to produce legal effects towards the debtor and third parties. Upon such notice: (a) the seller ceases to be the owner of the receivable, and he can no longer assign that credit, receive payments from the debtor or take any action in connection with the collection of that credit; (b) the debtor shall be notified of his creditor's identity; and (c) third parties shall know the assignor's condition with regard to the assigned credit.

Regarding the formalities of the notice, in order for the sale to be effective against the debtor (excluding third parties), the law does not require a particular formality for the notice to the debtor of the assignment of the receivable, it being thus possible to give such notice through a private letter, a telegram, through the notice of the complaint against the debtor or even verbally.

However, for the transfer to be effective *vis-à-vis* third parties other than the debtor, the law requires that the notice complies with certain formal conditions that provide authenticity to the fulfillment of the notice requirement, that is to say, through a public act. By "public act", jurisprudence and scholars' opinions have deemed that the participation of a public officer (i.e. public notary, courts) implies the existence of a public act. Depending on the quantity and size of the loans to be transferred, hiring notaries to serve notices to each debtor has a tremendous impact on the cost and timing of any transaction. Instead, to meet the "public act" requirement, the securitisation industry in Argentina has been publishing notices in the federal official gazette. There is no court precedent that has confirmed yet that publishing general notices complies or not with such legal standard.

A very important exception to the notice requirement has been established through Law 24,441 of Trusts [trusts under Argentine law are different to the Anglo Saxon trusts], which establishes that the sale of the receivable without notice of the assignment may still be enforceable *vis-à-vis* third parties when (i) the receivable contract expressly exempts the seller from the notice requirement (customary in receivable contract forms in Argentina), (ii) the transfer is made to securitise a credit portfolio and collateralise the issues of securities, and (iii) that the securities to be issued are registered with the Argentine Securities Commission ("CNV").

Among other transfer of assets that have to be recorded, and regardless whether the notice requirement is exempt or not, any transfer of a mortgage securing a loan has to be recorded with the real estate registry of the province where the relevant real estate is located. This recording impacts on the cost and timing of any transaction structure.

To avoid such a costly burden applicable to mortgage loans, Law No. 24,441 has also admitted the issue of mortgage securities upon the existence of a mortgage loan in the first degree of preference, which expressly authorises such issuance in the act of agreeing on the loan and creating the mortgage on the property. The issuance of the mortgage security shall be registered by the registry of real estate. The mortgage security represents the right of the seller under the mortgage loan. Once its creation has been recorded, it can be transmitted without the need to give any notice to the debtor or recording the transfer with the real estate registry. Nowadays, standard forms of mortgage loans suggested by the Central Bank and used by banks include the creation of mortgage securities in order to facilitate sales and securitisations.

Mortgage securities are usually book-entry securities. In this case, the designation of the entity in charge of the records of this kind of mortgage securities (where the public deed of the mortgage shall be deposited) shall be expressly registered within the corresponding registry of real property. The register of the mortgage securities shall be under the charge of clearing houses, banks or corporations organised exclusively for such purposes. Transfer of these kinds of mortgage securities shall be registered with such entity upon the filing of the corresponding transfer instrument, and it shall produce legal effects with respect to the debtor and third parties without any need to give notice of such transfer or registration to the registry of real property.

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

The general regime described in question 4.2 above is applicable also to the sale of consumer loans and of mortgage loans. With regard to the sale of Promissory Notes, the sale and perfection of

such are effected by endorsement of the note. Lastly, with respect to the marketable debt securities, it is only necessary to notify the agent that holds the register of ownership of sold securities.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment? Whether or not notice is required to perfect a sale, are there any benefits to giving notice - such as cutting off obligor set-off rights and other obligor defences?

Please refer to the first two paragraphs of the answer given to question 4.2. As long as the receivables contract does not expressly prohibit assignment, it is not necessary for the seller or for the purchaser to obtain debtors' consent to the sale of receivables. Contrarily, if the contract prohibits (or in any other manner restricts) the assignment, debtors' consent should be obtained. Notice perfects the assignment *vis-à-vis* third parties. Other benefits of notice are: (a) the seller ceases to be the owner of the receivable, and he can no longer assign that credit, receive payments from the debtor or take any action in connection with the collection of that credit; (b) the debtor shall be notified of his creditor's identity; and (c) third parties shall know the assignor's condition with regard to the assigned credit.

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective - for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings against the obligor or the seller have commenced? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

The notice or acceptance to be delivered to the debtor does not need to fulfill any specific requirements; any means is considered appropriate to notify. Please refer to the first two paragraphs of the answer given to question 4.2. According to section 1,464 of the Argentine Civil Code, in case of insolvency of the seller, the notice of the assignment or its acceptance could be delivered after the default of payments, but it will be ineffective against the creditors of the insolvency estate if it is delivered after the proceedings of the insolvency declaration.

4.6 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Argentina? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Argentina recognises prohibitions on sale or assignment and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or on any other basis?

Undoubtedly. The seller would have to indemnify the debtor against any loss arising in connection with the sale of the receivables, in case that, even though that act was expressly forbidden in the contract, the seller sold them nevertheless.

4.7 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

Other than identifying the original amount and the debtor, there are no statutory additional rules regarding the identification of sold receivables. The more information, the higher the likelihood of avoiding potential litigation.

4.8 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, what economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; or (d) a right of repurchase/redemption without jeopardising perfection?

None of the economic characteristics above will prevent perfection of the sale. A provision by which an option is granted to the seller to repurchase the receivables may, according to some court precedents and scholars' opinions, prevent not only perfection, but may also affect the validity of the sale.

4.9 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables (i.e., sales of receivables as and when they arise)?

Yes, he can. However, the agreement to make continuous sales will not be enforceable in the event of insolvency of the seller.

4.10 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to or after the seller's insolvency?

Argentine law permits the sale of future receivables. Thus, the seller can voluntarily transmit *inter vivos* future receivables without any specific form different from that required in question 4.2. Argentine law governs the general principle of freedom of forms, as stated in section 1,278 of the Argentine Civil Code. In connection with enforcement in the insolvency scenario of the seller, please see question 6.5 below. Finally, Argentine law does not permit the sale of future mortgages or pledges or those that were not created at the time of the sale. This restriction will not apply to the assignment of the agreement from which future credits will arise.

4.11 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Unless prohibited under the security contract itself, pursuant to Article 1,458 of the Civil Code, the sale/assignment of a receivable (credit) automatically includes all related securities thus entitling the new creditor to enforce such securities. It is customary, however, to serve notice of the transfer to the third parties that granted such securities (e.g., the owner of the mortgaged land, a pledgor of personal property, etc.).

5 Security Issues

5.1 Back-up Security. Is it customary in Argentina to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

Please note that in all transfers of rights for valuable consideration there exists a legal and implied guarantee of the validity of the title (*garantía de evicción*), that is to say, Argentine law foresees that if a purchaser, due to a cause prior to, or contemporaneous with, the acquisition, by virtue of a judgment is deprived totally or partially of the rights acquired or suffers any other loss with respect to its ownership, enjoyment or possession rights, the purchaser has the right to be indemnified by the seller. Otherwise, it is not customary in Argentina to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security.

5.2 Seller Security. If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of Argentina, and for such security interest to be perfected?

Please refer to the answer to question 5.1 above.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in Argentina to grant and perfect a security interest in purchased receivables governed by the laws of Argentina and the related security?

The requirements to be fulfilled depend on the type of security to be created. The most common security interests that are granted are the pledge, the collateral trust and the assignment. The requirements to be fulfilled in the case of the pledge and in the assignment are mostly similar. For example, the most important requirements are that: (a) the debtor of the pledged/assigned credit be notified (though, there are certain exemptions in cases regarding assignments to trusts that publicly offer securities); (b) the credit be evidenced by a written document; (c) the document in which the credit is evidenced be delivered to the creditor or to a third party; and in the case of the pledge agreement (d) it should be perfected through a public deed or a private document with true date and it will have to indicate the amount of the secured obligation.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of Argentina, and that security interest is valid and perfected under the laws of the purchaser's country, will it be treated as valid and perfected in Argentina or must additional steps be taken in Argentina?

In principle it should be treated as valid and perfected in our country. Nevertheless, in the case of a security interest over receivables payable in Argentina, an Argentine court could consider such receivables movable assets with a permanent situation in Argentina (please refer to the answer to question 2.1 above), and therefore construe the validity and efficacy of the said security interest in the light of Argentine law.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?

The requirements to be complied with depend on the type of security interest created and the assets to which such security interest applies. It is worth pointing out, however, in the case of a pledge (a security interest frequently created under our law), that if the same was to apply to certain negotiable securities originated in accordance with Argentine law and transmissible by means of endorsement, the notification of the granting of the security interest to the assigned debtor could be dispensed with. In general, when granting a loan or financing any payment, the lender will require the debtor to pay a life insurance linked to the loan covering the loan or credit balance. In case of a mortgage or

pledge, an additional insurance covering the asset shall be taken out. Regarding insurance requirements, if the security interest was a mortgage loan or a pledge granted by certain financial entities regulated by law (such as banks), the mentioned life insurance linked to the loan is mandatory.

5.6 Trusts. Does Argentina recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets until turned over to the purchaser?

Yes, it does (*fideicomisos*).

5.7 Bank Accounts. Does Argentina recognise escrow accounts? Can security be taken over a bank account located in Argentina? If so, what is the typical method? Would courts in Argentina recognise a foreign-law grant of security (for example, an English law debenture) taken over a bank account located in Argentina?

The most common legal figures to be used are the collateral trust or the commercial pledge over the bank accounts and the amounts deposited therein. In this sense, Section 3,207 of the Argentine Civil Code provides for a pledge "in the hands of a third party" as different from a pledge in the hands of the creditor. However, the trust would be safer than the pledge (since a third neutral party – the trustee – should be the holder of the account). In case of a pledge, it works as any other pledge over contractual rights (e.g. the rights over the opening account contract) and the pledgor remains the owner of the account. With respect to the foreign-law garn of security taken over a bank account located in Argentina, in principle, it should be treated as valid and perfected in our country.

5.8 **Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?**

If the security was validly granted, the secured party will have control on all cash flowing into the account. However, please see the comments made in case of insolvency proceedings (response to question 6.5, among others).

5.9 **Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?**

It will depend on the wording and limitations imposed by the security agreement itself.

6 Insolvency Laws

6.1 **Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will Argentina's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?**

The Argentine Bankruptcy Act contemplates three types of insolvency proceedings: bankruptcy reorganisation (*concurso preventivo*); out-of-court composition with creditors (but with limited court intervention after an agreement is reached) (*acuerdo preventivo extrajudicial*); and bankruptcy liquidation (*quiebra*). If the sale has been perfected in conformity with the law and if there has been a true sale, neither the opening of a bankruptcy reorganisation of the seller, nor the application for out-of-court composition with creditors, nor the declaration of bankruptcy liquidation of the seller could prevent, or give reasons for, an official insolvency to prevent the exercise of the rights of the purchaser over the acquired receivables.

6.2 **Insolvency Official's Powers. If there is no stay of action under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (by means of injunction, stay order or other action)?**

If the sale has been performed in accordance with the law and if there has been a true sale, the insolvency official could not prohibit the purchaser's exercise of rights.

6.3 **Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding? What are the lengths of the "suspect" or "preference" periods in Argentina for (a) transactions between unrelated parties and (b) transactions between related parties?**

Under bankruptcy liquidation proceedings, acts exist that could be directly ineffective by virtue of the law or, in other cases, by virtue of a court resolution. The Argentine Bankruptcy Act contemplates a "suspect period" which takes place between the date on which the suspension of payments (*cesación de pagos*) began and the date of the bankruptcy adjudgment, even though, for purposes of this matter, the date of suspension of payments (*cesación de pagos*) cannot be backdated further than two years from the date of the bankruptcy liquidation adjudgment or of the bankruptcy reorganisation filing (provided that it has preceded the relevant bankruptcy liquidation). The Argentine Bankruptcy Act envisages that the following acts performed by the debtor within the "suspect period" are directly ineffective by virtue of the law in respect of the creditors: (a) gratuitous acts; (b) anticipated payment of debts whose expiration should have occurred on the date of the bankruptcy liquidation adjudgment or later; and (c) the granting of a mortgage, pledge or any other preference, with respect to a non-expired obligation that originally did not have such security interest. On the other hand, other acts prejudicial to creditors, celebrated during the "suspect period", can be ruled ineffective by the bankruptcy court, if the third party that celebrated the act with the insolvent party had knowledge of the suspension of payments (*cesación de pagos*) of the debtor. It should also be mentioned that it is the third party that celebrated the act with the insolvent party that must prove that such act did not prejudice the creditors. All that has been explained is with regard to bankruptcy liquidation but is not applicable to bankruptcy reorganisation or out-of-court composition with creditors. Lastly, we should mention that in the Argentine Civil Code the possibility of filing an action for fraud exists as envisaged with respect to all acts that may have caused, or aggravated, the insolvency of the debtor.

6.4 **Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding?**

Under the Argentine Bankruptcy Act, where two or more individuals or legal entities comprise permanently an economic group, they can request jointly their bankruptcy reorganisation stating the facts upon which the existence of the economic group is based. The request must include all the members of the group without exception. The bankruptcy court may dismiss the request if it should consider that the existence of the group is not evidenced. Within the context of bankruptcy reorganisation proceedings of an economic group, the appointed receiver must prepare, apart from specific reports, a statement of consolidated assets and liabilities of the insolvent group. The regulations governing bankruptcy reorganisation proceedings of an economic group are also applied to those that by means of any legal act may have guaranteed the obligations of an insolvent party and that may have applied for its bankruptcy reorganisation proceedings to be filed together with that of its guaranteed party. On the other hand, in the case of bankruptcy liquidation, the law envisages some cases of extension of the bankruptcy liquidation in which, if there exists confusion of assets between the original insolvent party and those to whom the declaration of bankruptcy has been extended, a sole mass of assets is formed in respect of all the creditors of the related parties adjudged bankrupt.

6.5 Effect of Proceedings on Future Receivables. If insolvency proceedings are commenced against the seller in Argentina, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings or (b) on sales of receivables that only come into existence after the commencement of such proceedings?

In general, we can say that if the price for the receivable was already paid, the purchaser will collect his claim in the same conditions as any other unsecured creditor. And if the price was not yet paid, performance of the contract will be conditioned to the decision of the bankruptcy judge. An important issue in this respect is the financing of the production of the good for which the future receivable will be created.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in Argentina establishing a legal framework for securitisation transactions? If so, what are the basics?

There is no law that specifically provides for securitisation transactions. The one that is probably more specific is Law No. 24,441. Also, in case the securitisation transactions involve public offering of securities the applicable law will be Law No. 26,831.

7.2 Securitisation Entities. Does Argentina have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

Yes, it does. It is Law No. 24,441, which governs the creation of "financial" trusts, in other words, trusts that issue securities. Under Argentine law, the trust is not an entity, but is an estate separate from those of the trustee (purchaser) and the settler (seller). Accordingly, assets of the trust shall not be the target of any action by the trustee's and seller's creditors and their respective bankruptcies (except fraud). The trustee is in charge of operation and management of the business of the trust. Only banks licensed in Argentina and entities authorised by the National Securities Commission may act as trustees. The trustee shall not be personally liable to any obligation of the trust, which shall only be payable with the assets of the trust, except when the trustee acted negligently or with willful misconduct. The entities authorised by the National Securities Commission are required to meet a relativity low solvency requirement.

7.3 Non-Recourse Clause. Will a court in Argentina give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

Yes, it is highly probable that a court will hold such a contractual provision among the parties as valid.

7.4 Non-Petition Clause. Will a court in Argentina give effect to a contractual provision (even if the contract's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

As long as the purchaser is a trust, a trustee would not be personally liable to any obligation of the trust, which shall only be payable with the assets of the trust, except when the trustee acted negligently or with willful misconduct.

7.5 Priority of Payments "Waterfall". Will a court in Argentina give effect to a contractual provision (even if the contract's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

In regular situations, the answer will be yes. In the case of insolvency proceedings and generally speaking, the court would give effect to the subordination of a credit to others.

7.6 Independent Director. Will a court in Argentina give effect to a contractual provision (even if the contract's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

In principle, such a provision should be treated as valid and perfected in our country. However, in case the provision forbids the directors to take certain actions in specific sensitive subjects, it could be declared by the acting court to be against Argentina's public policy (see the response to question 3.4 above, among others).

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in Argentina, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in Argentina? Does the answer to the preceding question change if the purchaser does business with other sellers in Argentina?

Foreign companies are authorised by the Argentine Companies Law to perform "isolated" acts of commerce in Argentina. Acts of commerce on a "habitual" basis require the registration of the purchaser. The answer would depend on the circumstances of the case and it would depend on the size and characteristics of the receivable portfolio acquired. However, in practice, due to tax and foreign exchange reasons, receivable portfolios are usually acquired by a locally-organised trust and, depending on whether or not funds are offshore or inshore, foreign investors would not need to be registered to do business in Argentina to purchase the securities issued by the trust with, as a consequence, less foreign exchange restrictions.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

If the seller is an Argentine company, no special licence would be required. However, it could be required to present a power of attorney to appear before a court. If it is a foreign company, it is probably convenient and, depending on the circumstances, in some cases mandatory that the foreign company becomes registered under either Section 118 or 123 of the Business Associations Law (No. 19550, as amended).

8.3 Data Protection. Does Argentina have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

Several rules protect the data provided by obligors, the most relevant being Law No. 25,326. It not only applies to consumer obligors, but also to enterprises. Please note that Argentina has a vast and strict data protection regime. Please note that Argentina has a vast and strict data protection regime. For instance, Argentine data protection regulations require to collect data owners' (who can be individuals or legal entities) prior, written, express and informed consent for any kind of processing of their personal data (except for a few exceptions). We remain at your disposal to analyse any specific measures or precautions to be taken regarding a particular project/situation. Please note that Argentina has a vast and strict data protection regime. For instance, Argentine data protection regulations require to collect data owners' (who can be individuals or legal entities) prior, written, express and informed consent for any kind of processing of their personal data (except for a few exceptions).

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of Argentina? Briefly, what is required?

Debtors of the sold receivables are considered consumers. Thus, the purchaser should have to comply with several consumer protection rules, the most relevant one being Law No. 24,240. Among other relevant requirements, that law requires: (i) giving true, objective, detailed and sufficient information of the given services, and respect all terms and conditions as they have been published and agreed; and (ii) avoiding clauses that restrict the rights of the consumer or enlarge the faculties of the other party. In case of doubt in the interpretation of a clause, that which is most favourable to the consumer will always prevail.

8.5 Currency Restrictions. Does Argentina have laws restricting the exchange of Argentina's currency for other currencies or the making of payments in Argentina's currency to persons outside the country?

Yes, there are several, especially when foreign investors invest in securities issued by a trust organised in Argentina. There are restrictions to inflows, outflows and to the purchase and sale of foreign currency notes in Argentina. Restrictions vary depending on whether the person operating in the foreign exchange market is a resident or a non-resident of Argentina.

9. Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in Argentina? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located?

The obligation to perform withholdings and applicable rates may vary depending on the nature of the receivables and the location of the beneficiary of the payment. For instance, in case the recipient of the payment is a local resident and interest is being paid, debtors who are companies or individuals that borrowed money for their business, have to make income tax withholdings on interest payments to the lenders. The withholding rate may vary from 3 per cent to 35 per cent. In principle, receivables originated in consumer loans are not subject to withholding. The purchaser of receivables may have to perform these withholdings, substituting the debtor, upon payment to the seller. In the case of the payment of interest to non-residents, withholding rates may vary from 15.05 per cent to 35 per cent depending on the beneficiary and its country of residence. In case a Double Taxation Treaty is applicable, this rate may be lower. In addition, the sale of receivables may also be subject to income tax withholdings.

9.2 Seller Tax Accounting. Does Argentina require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

No specific accounting policy must be adopted.

9.3 Stamp Duty, etc. Does Argentina impose stamp duty or other documentary taxes on sales of receivables?

The receivable purchase contract may be subject to stamp tax in Argentina's provinces and in the City of Buenos Aires (Argentina is a federal country). However, most jurisdictions exempt sellers and purchasers from stamp tax as long as the transfer was made for the purpose of a securitisation deal and the securities are registered with the CNV.

9.4 Value Added Taxes. Does Argentina impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

As a general rule, the sale of goods or services is levied by VAT with a 21 per cent rate. The sale of certain goods or services may be levied with lower or higher rates depending on the specific goods or services. The fees for collection agent services are also taxed with VAT at a 21 per cent rate. In the case of sales of receivables, VAT is imposed at the rate of 21 per cent on the spread between the value of the portfolio and actual purchase price. However, sales to a trust organised under Argentine law (the vehicle used for securitisation deals and the purchase of distressed credit portfolios in Argentina) are exempt from VAT.

9.5 **Purchaser Liability. If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?**

Unless the receivables are part of the assets sold in the transaction qualifying as a Transfer of a Going Concern (Law No. 11,867), the principle is that the tax authority would only claim against the party that is liable. If the transaction qualifies as a part of a Transfer of a Going Concern, special procedures must be accomplished to exempt the purchaser from the tax liabilities of the seller. In the case of stamp tax, both parties are jointly and severally liable to pay the tax.

9.6 **Doing Business. Assuming that the purchaser conducts no other business in Argentina, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in Argentina?**

No, not as long as the purchaser does not reside or have a domicile in Argentina and does not maintain a permanent establishment in Argentina. If you consider a sole transaction of the purchase of receivables, the appointment of a servicer and the enforcement, we do not think that a purchaser would become personally liable for taxes in Argentina. However, depending on the circumstances, the debtor or the collection agent would have to make high withholdings on interest payments due to the fact that the creditor is domiciled abroad. For this reason, it would probably be more efficient to organise a local vehicle or a trust for the purchase.

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Roberto A. Fortunati is a partner of the Firm. His professional activity is mainly concentrated in banking, and corporate finance with a focus in the oil and gas and mining sectors. He has also been acting as consultant to the World Bank in insolvency matters. Mr. Fortunati acted as leading local counsel for several major project financings, mainly related to mining, oil and gas, and utilities. He has been very active in the fields of out-of-court debt restructurings (work-outs), privatisation of state-owned companies, M&A and in the start-up of venture capital investments. He is member of the board of directors of several corporations, including his acting as independent director and a member of auditing committees, and an arbitrator to the MAE (the local OTC electronic market). He is a member of the Advisory Board of the School of Law of Torcuato Di Tella University, Buenos Aires, and teaches project financing in a postgraduate course on Oil and Gas Law, at the School of Law of the University of Buenos Aires. Mr. Fortunati founded the Firm Fortunati & Asociados in early 2003, a firm which has recently merged with Estudio Beccar Varela. He acted as General Counsel of Citibank in Argentina, after being partner of Estudio Beccar Varela, in Buenos Aires. Mr. Fortunati started his professional career as in-house counsel of Amoco Argentina Oil Company. He graduated from the Law School of the University of Buenos Aires in 1979.

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Estudio Beccar Varela is an Argentine law firm based in the city of Buenos Aires. For more than a century it has counselled and advised its clients in all aspects of corporate and financial law. It is frequently involved in many of the largest Argentine banking and corporate transactions and has demonstrated a sophisticated level of expertise to structure operations which match the international legal frame with the local legal environment. Many of the firm's clients have been serviced by the firm for over 70 years, the oldest current client being Citibank, N.A., since 1914.

The Firm's practices include corporate law, banking law, capital markets, mergers and acquisitions, insurance law, natural resources law, litigation, labour, tax, customs, administrative, intellectual property law and trademarks and patents law, antitrust and consumer protection law.

The Firm is one of the leaders in the securitisation practice in Argentina. For almost 15 years now since the securitisation practice has been common practice with the passing of Law No. 24,441 (Trust Act), the Firm has been advising arrangers, sellers, issuers, trustees, rating agencies and even foreign sovereigns.