

Argentina - Securitisation 2016 · ICLG - International Comparative Legal Guides

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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, in order for the sale of goods and services to be enforceable, it is not necessary 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 evidenced in writing.

Additionally, the sale of certain goods must be evidenced by certain formalities. Although invoices may constitute evidence of a contract, in cases of an historic relationship between the parties (which may also infer the existence of a contract), they constitute a relevant element for determining the presence of a contractual relationship.

1.2 Consumer Protections. Do your jurisdiction'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?

Under Argentina legislation, specific statutory limits are applicable to interest rates on credit card contracts. However, other types of credit and receivables are not subject to specific statutory limits, as the Argentine Central Bank recently eliminated the regulation that limited interest rates on financing to individuals. In the latter, prior authorisation from the Argentine Central Bank is required to increase commissions on financial services considered as "Basic": savings accounts in Argentina Pesos, credit cards, etc. (Communication "A" 5608).

Argentine laws do not fix limits to the interest rates in non-banking parties' contracts. Although capitalisation on interests is allowed on a limited basis, judges are expressly allowed to reduce interest rates that much exceed the average cost of similar financing without valid justification.

Argentine legislation envisages the right of all creditors to claim indemnification due to late payment. In particular, when a payment obligation is late, the debtor in default owes punitive charges.

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?

The contracts used for such purposes will be governed by private law, but filings required by specific rules of administrative law may be required. Likewise, the enforcement of contracts may be

conditioned to compliance with certain prior requirements.

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Choice of Law – Receivables Contracts

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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 your jurisdiction that will determine the governing law of the contract?

The governing law applicable to an international receivables contract will be determined by the applicable international treaty. If there is no international treaty applicable, the Argentine Commercial and Civil Code (“CCC”) will apply by default.

In general terms, the Conflict of Law principle applicable to an international contract is the freedom of the parties to elect the applicable law provided there is a point of contact. In case the parties do not elect an applicable law, the CCC establishes the following principles: the governing law to a contract shall be the laws and customs of the country that is the place of performance of the contract (Section 2,652). In case the place of performance is not identified, it will be assumed that such place is the domicile of the debtor. If the latter is not possible, applicable laws to a contract shall be those of the place of execution of said contract (Section 2,652).

Please consider that Argentina’s Conflict of Law principles are not contained in one single source, but spread in different regulatory bodies (e.g. the CCC, the Corporations Act, and Bankruptcy Act, among other laws).

2.2 Base Case. If the seller and the obligor are both resident in your jurisdiction, and the transactions giving rise to the receivables and the payment of the receivables take place in your jurisdiction, and the seller and the obligor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your jurisdiction 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 your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction 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 your jurisdiction 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?

Notwithstanding the provisions established in Section 2,667, the CCC (that exclusively determines the application of Argentine Law for real property located in Argentina) and some other exceptions like consumer agreements, in contractual matters the seller and the obligor are free to choose the law which will govern the receivables, provided there is a reasonable connection between the parties or

the receivables contract and the chosen law. For instance, such connection may arise from the place of execution of the contract, one or both parties' domiciles, the place in which the obligations are to be performed, among other connections.

As regards the Argentine Courts' recognition of choices of law, there are some principles under Argentine Law that operate as limitations to the application and recognition of foreign law and that are also incorporated under Section 2651 e) and f) of the CCC:

(i) Argentine international public policy: The Argentine international public policy's limitation is not a fixed set of rules which the foreign law must comply with, but certain core principles which the foreign law must not violate. The analysis under the public policy limitation's standpoint is applied at a *posteriori* basis. It is important to mention that there are not many case law precedents where judges ruled that certain foreign laws violated Argentina's public policy and even fewer precedents where said violations were determined due to the Choice of Law in a commercial contract.

(ii) Immediate Application Norms: Notwithstanding the foregoing, there is as well a tendency to acknowledge certain principles that operate *a priori* and are thus inflexible rules which are applicable despite the election of a foreign law by the parties. These rules are applicable even if the parties have chosen a different law to govern the contract. Please, bear in mind that these *a priori* norms are only applicable to certain specific cases, such as to corporations incorporated abroad that carry out their main business activities in the country (Section 124 of the Corporations Act).

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

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 April 11th 1980, were ratified by Argentina on July 19th 1983 through Law 22,765. These rules became effective on January 1st 1988.

Please bear in mind that, according to the Argentinean Constitution, international treaties rank senior to domestic laws.

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Choice of Law – Receivables Purchase Agreement

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3.1 Base Case. Does your jurisdiction'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., your jurisdiction's laws or foreign laws)?

There is no specific rule, thus there is freedom to agree on the applicable law to both the sale of receivables and the receivables themselves.

3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is

governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction 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 debtor's domicile is one of the usual connections used by the Argentine Conflict of Law rules. Therefore, if the seller's domicile and the obligor's domicile are both in Argentina, an Argentine Court would probably consider that the choice of the law of the country of the seller's domicile is a reasonable connection for these kinds of commercial relationships. Thus, the sale would be deemed effective against the seller (subject to some formalities detailed in question 4.2) and, in general terms, against any other creditor.

As regards the position of creditors or insolvency administrators in the case a bankruptcy or insolvency proceeding is filed in Argentina, Bankruptcy Law provisions should be considered as well as other international treaties that may be applicable, as the case may be. In that sense, even if bankruptcy and insolvency rules do not interfere with the Choice of Law provisions themselves, the enforceability of the sale or receivables contract within a bankruptcy or insolvency proceeding could eventually depend on certain bankruptcy and insolvency proceedings' specific rules, such as the verification and acceptance (or not) of the credit and the violation (or not) of third parties' rights (i.e. fraudulent bankruptcy, acts or agreements executed by the debtor during a period prior to commencement of proceedings in fraud of other creditors, among others).

In relation to the verification and acceptance of a foreign credit within a bankruptcy or insolvency proceeding initiated in Argentina, please take into consideration that Section 4 of the Bankruptcy Law sets forth that foreign creditors (being those whose credits are paid outside Argentina) shall only be allowed to present themselves in the bankruptcy proceedings in Argentina and file a claim for their outstanding credit before the Argentinean judge only if the laws of the country of said foreign creditor would likewise allow an Argentine creditor to file a claim for his/her outstanding credit –payable in Argentina – in any bankruptcy proceedings in said foreign country. Other requirements may also be complied with under Bankruptcy Law or international treaties as the case may be.

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 your jurisdiction, will a court in your jurisdiction 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?

Please, see the answer to question 3.2.

3.4 Example 3: If (a) the seller is located in your jurisdiction 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 your jurisdiction 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 your jurisdiction's own sale requirements?

As said before, under the Argentine Conflict of Law rules, the seller, the obligor and the purchaser are free to choose the law which will govern their commercial relationship, provided there is a reasonable connection between the case and the chosen law. If the Argentine Court determines that the election is valid under Argentine Law and the sale has been legally executed under the applicable foreign law, an Argentine Court would probably recognise the sale as being effective against the seller and other parties. This is to say, as long as Argentina's international public policy is not violated, the sale's validity would be analysed only under the applicable foreign law in spite of any specific Argentine sale requirements.

In the case of bankruptcy, please note that law provisions regarding rights of foreign creditors and reciprocity should be taken into account (please see question 3.2).

3.5 Example 4: If (a) the obligor is located in your jurisdiction 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 your jurisdiction 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 your jurisdiction's own sale requirements?

If the applicable foreign law was validly chosen, as mentioned in the previous answer, 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 the rights of creditors and reciprocity in case of bankruptcy proceedings opened in Argentina with foreign creditors should be considered (please see question 3.2).

3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (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 your jurisdiction 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 your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?

The customary method for a seller to sell receivables to a purchaser is an assignment contract. The customary terminology to be used will be "assignment".

Asset Sales

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4.1 Sale Methods Generally. In your jurisdiction 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 for a seller to sell receivables to a purchaser is an assignment contract. The customary terminology to be used will be “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. However, as a general principle, for the sale of any receivable, the law requires prior written notice to the debtor of such assignment in order to produce legal effects towards the debtor and third parties. Regarding the formalities of such notice, the law does not require a particular formality. Upon such notice: (a) the seller ceases to be the owner of the receivable and therefore 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 the creditor's identity; and (c) third parties shall acknowledge the assignor's condition with regard to the assigned credit.

However, for the transfer to be effective *vis-à-vis* third parties other than the debtor, the law requires the notice to be instrumented through a public act.

Act 24,441 establishes an exception to the notice requirement. The sale of the receivable without notice of the assignment may still be enforceable *vis-à-vis* when the transfer is made to: (i) ensure the issuance of securities by public offering; (ii) incorporate the assets to a company to securitise them by public offering, being the services and interests guaranteed by those assets; and (iii) incorporate the assets so as to create a fund of loans.

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 also applicable to the sale of consumer loans. With regard to Promissory Notes, the sale and perfection of such are effected by the endorsement of the note. With respect to marketable debt securities, it is only necessary to notify the agent that holds the register of ownership of sold securities.

Regarding the transfer of a mortgage to guarantee a loan, it has to be recorded with the Real Estate Registry of the corresponding jurisdiction. Mortgage securities represent the right of the seller under the mortgage loan, are effected by its endorsement and it shall produce legal effects with respect to the debtor and third parties without any notice of such transfer or registration to the Real Estate

Registry.

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? 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?

As long as the receivables contract does not expressly prohibit assignment, it is not necessary for the seller or the purchaser to obtain the debtors' consent to the sale of receivables. On the contrary, if the contract prohibits (or, in any other manner, restricts) the assignment, the 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 therefore 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 this creditor's identity; and (c) third parties shall know the assignor's condition with regard to the assigned credit. For further information please refer to the answer to question 4.2.

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 comply with any specific requirements. According to Section 1,623 of the CCC, in case of insolvency of the seller, if the notice of the assignment – or its acceptance – is delivered after the declaration of insolvency, it will have no effect against the insolvency creditors. For further information please refer to the answer to question 4.2.

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that "None of the [seller's] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]" be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says "This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says "The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights)?

Regarding receivables contracts, the first two clauses lead to the same practical result, which requires the consent of the obligor. Notwithstanding, the first clause emphasises the rights and obligations individually considered, while the second clause considers the contractual position as a whole. With

respect to the third clause, the restriction refers only to the obligations, not to the rights. Consequently, the rights may be transferred.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or "seller's rights" under the receivables contract, are such restrictions generally enforceable in your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction recognises restrictions on sale or assignment of receivables 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 tort, or on any other basis?

The abovementioned restrictions are applicable in Argentina, provided they do not contravene the "public order" – a set of fundamental principles on which the social organisation is established – which limits the autonomy of the party.

Regarding the breach of the aforementioned clauses, the seller will undoubtedly be required to indemnify the debtor for any losses arising from the illegal act.

4.8 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?

There are no statutory rules regarding the identification of sold receivables other than identifying (or providing enough information to identify) the parties and the subject matter of the contract. The more information is provided, the higher the likelihood of avoiding potential litigation.

4.9 Respect for Intent of Parties; Economic Effects on Sale. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent 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. However, should the intent of parties be to damage third parties or contrary to the public order, a judge may determine that the contract is void.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

The seller can agree in an enforceable manner to continuous sales of receivables. Notwithstanding, the abovementioned agreement may not be enforceable in the event of insolvency of the seller according to the Bankruptcy Act 24,522 as amended.

4.11 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?

Under Argentinean law, the sale of future receivables is permitted. Thus, the seller can voluntarily *inter vivos* transfer future receivables without any specific formalities to be followed. Sections 284 and 1,015, of the CCC state the general principle of freedom of forms. In connection with enforcement in the insolvency scenario of the seller, please see question 6.5 below.

4.12 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 agreement itself, pursuant to Sections 399, 856 and 857 of the CCC (these sections state the principles that govern the Argentinean legal system in this matter), the sale/assignment of a receivable automatically includes all related securities, thus entitling the new creditor to enforce such securities. Furthermore, regarding securities assignment, Section 1,818 of the CCC expressly states that all securities are transferred concurrently with their ancillary rights.

4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor’s set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor’s set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

The obligor is entitled to file against the purchase all objections that concern the seller. Argentinean law does not require any reservation of rights from the obligor when being notified of the sale.

Nevertheless, upon the obligor’s receipt of notice of sale, his right to set-off against the purchaser terminates.

Unless the parties have agreed the prohibition of the transfer of credit, neither the seller nor the purchaser will be liable to the obligor for damages caused by such termination.

5.1 Back-up Security. Is it customary in your jurisdiction to take a “back-up” security interest over

the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected?

The CCC provides, for all assignments of rights with valuable consideration, a legal and implied guarantee for warranty of title. 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 it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your jurisdiction, and for such security interest to be perfected?

Please refer to answer to the question 5.1.

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 your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?

The requirements to be complied with depend on the type of security to be created. The most common security interests are the pledge, the collateral trust and the assignment. In the case of a pledge or an assignment the following requirements shall be satisfied: (a) the debtor of the pledged/assigned credit must be notified (though, there are certain exemptions in cases regarding assignments to trusts with public offering); (b) the credit must be evidenced with a written instrument; (c) the instrument must be delivered to the creditor or to a third party; and (d) in the case of the pledge agreement, it should be perfected through a public deed or a private instrument with a set date and the amount of the secured obligation.

Regarding collateral trusts, the agreement must comply with requirements set forth in the CCC, Section 1,667 and 1,680.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, 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 your jurisdiction or must additional steps be taken in your jurisdiction?

Yes, it will be treated as valid and perfected in Argentina. Nevertheless, in the case of a security interest over receivables payable in Argentina, an Argentinean court could consider such receivables movable assets with a permanent situation in Argentina (please refer to the answer to question 2.1), and therefore construe the validity and efficacy of said security interest in the light of Argentinean 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 that will apply depend on the type of security interest created and the underlying

assets of such security. In general, when granting a loan or financing a payment, the lender will require the debtor to pay a life insurance linked to the loan covering the loan or credit balance. In the 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, the mentioned life insurance linked to the loan is mandatory.

5.6 Trusts. Does your jurisdiction 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?

Argentina recognises trusts under Section 1,666 and subsequent of the CCC.

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

The most common legal figures to be used over the bank accounts and the amounts deposited therein are the collateral trust or the commercial pledge.

Section 2,221 of the CCC provides for a pledge "in the hands of a third party" as different from a pledge "in the hands of the creditor" that works as any other pledge over contractual rights being the pledgor the owner of the account.

On the other hand, trusts have a different structure since the third neutral party – the trustee – is the holder of the account.

With respect to the foreign law provision of security taken over a bank account located in Argentina, in principle, it should be treated as valid and perfected in our country. Please be informed that any subsequent transfer of funds from a local pledged bank account to any foreign bank account will be subject to local foreign exchange regulations.

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 in the answer to question 6.5. Please be informed that Argentine foreign exchange regulations apply to any transfer of funds from local accounts to foreign accounts, as well as exchange of currency within local accounts.

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

6

Insolvency Laws

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6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your jurisdiction's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that 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 Argentinean Bankruptcy Act envisages 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 according to 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. There is no such "stay of action" under Argentinean legislation.

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 has no power to prohibit the purchaser's exercise of rights. However, in certain circumstances, the official may request the judge to take injunctions to protect third parties.

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 your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties?

Under bankruptcy liquidation proceedings, some acts could be directly declared ineffective by virtue of law or, in other cases, by virtue of a court resolution. The Argentinean Bankruptcy Act provides a "suspect period" which begins two years prior to the date on which the suspension of payments began and ends on the date of the bankruptcy, even though, for the purposes of this matter, the date of suspension of payments cannot be backdated further than two years from the date of the bankruptcy.

liquidation or of the filing for bankruptcy reorganisation (provided that it has preceded the relevant bankruptcy liquidation).

The Argentinean Bankruptcy Act envisages that the following acts performed by the debtor within the “suspect period” are directly ineffective by virtue of 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 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, a bankruptcy court may rule as ineffective other acts prejudicial to creditors held during the “suspect period” if the third party that held the act with the insolvent party had knowledge of the suspension of payments of the debtor. It should also be mentioned that the third party that held the act with the insolvent party shall prove that such act did not prejudice the creditors.

All of the above refer to bankruptcy liquidation but are not applicable to bankruptcy reorganisation or out-of-court composition with creditors. Finally, Section 338 and subsequent of the CCC provides the possibility of filing an action for fraud 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?

The Argentinean Bankruptcy Act envisages some cases of extension of the bankruptcy liquidation in which, if confusion of assets between the original insolvent party and those who could be declared in extended bankruptcy, a sole mass of assets is formed in respect of all the creditors of the related parties adjudged bankrupt.

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

If the receivables were already paid, the purchaser will file a claim along with any other unsecured creditors. Moreover, and if the payment has not been made yet, performance of the contract will be conditioned to the decision taken under the bankruptcy procedure.

6.6 Effect of Limited Recourse Provisions. If a debtor’s contract contains a limited recourse provision (see question 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

The debtor may be declared insolvent if such limited recourse provision was declared not valid for affecting third party rights.

Special Rules

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

The legal framework for securitisation transactions within the scope of public offering involves the Capital Markets Act 26,831, the Securities Act 23,576, the Investment Funds Act 24.083 and the rules of the Argentinean Securities and Exchange Commission (the “CNV”).

7.2 Securitisation Entities. Does your jurisdiction 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?

Section 1,690 and subsequent of the CCC governs the creation of “financial” trusts. Under Argentine law, the trust is not an entity but a separate equity from that of the trustee (purchaser) and the trustor (seller). Accordingly, equity of the trust shall not be the target of any action by the trustee’s and or the trustor’s creditors (except fraud). Financial entities and non-financial entities, both authorised by the CNV, are the only entities authorised to act as financial trustees in Argentina. The trustee shall not be personally liable to any obligation of the trust, which shall only be payable with the equity of the trust, except when the trustee acted negligently or with wilful misconduct.

7.3 Limited-Recourse Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement’s governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

Section 944 of the CCC establishes that the waiver of rights will only be valid when not prohibited by law and only affects private interests. However, a waiver in advance of defence in court is not permitted at any time.

7.4 Non-Petition Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement’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?

Please see the answers to questions 7.3 and 2.3.

7.5 Priority of Payments “Waterfall”. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement’s governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

Under regular situations, the answer would be yes. From a wide scope, in the case of insolvency proceedings, the Court would give effect to the subordination of a credit to others.

7.6 Independent Director. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement'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 provision should be treated as valid and perfected in our country. However, in the case of a provision forbidding 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).

8

Regulatory Issues

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8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, 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 your jurisdiction? Does the answer to the preceding question change if the purchaser does business with other sellers in your jurisdiction?

Foreign companies are authorised by the Argentine Corporate Act 19,550 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 on the size and characteristics of the portfolio acquired. Purchase of receivables payable offshore can be done abroad without performing any commercial activity in Argentina, thus the purchaser would not need to register in this jurisdiction. Purchase of receivables payable in Argentina would require compliance by the foreign purchaser with local foreign exchange regulations to transfer funds abroad, and may also trigger the obligation of registering (establishing a local branch or subsidiary) to carry out "habitual" commercial activities. As for financial institutions in Argentina, their activities are highly regulated and require prior authorisation from the ACB. However, the purchase of receivables would not be considered – by itself – a financial activity subject to ACB's authorisation, unless the purchaser also carries out deposit-taking activities.

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 Argentinean company, no special licence would be required. However, a power of attorney to appear before a court will be required. On the other hand, if the seller is a foreign company, it may be mandatory to be registered under either Section 118 or 123 of the Argentine Corporate Act 19,550.

8.3 Data Protection. Does your jurisdiction 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 Act 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. For instance, Argentine data protection regulations require the collection of owners' data (who can be individuals or legal entities) with 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 your jurisdiction? Briefly, what is required?

If obligors are considered consumers, the purchaser should have to comply with several consumer protection rules, the most relevant one being Act 24,240. The aforementioned Act requires that purchasers, among others: (i) give true, objective, detailed and sufficient information of the provided services, and respect all terms and conditions as published and agreed; and (ii) avoid clauses that restrict rights of the consumer or enlarge the faculties of the other party. In the case of doubt in the interpretation of a clause, the most favourable understanding towards the consumer will always prevail.

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

There are several currency restrictions, for instance when a foreigner invests in securities issued by trusts organised in Argentina. There are restrictions to inflows, outflows and to the purchase and sale of foreign currency in this jurisdiction. Restrictions vary depending on whether the person operating in the foreign exchange market is a resident or a non-resident of Argentina. Payments in Argentina's currency abroad would have to be completed in cash, as the Argentine Peso is not a hard currency and thus cannot be transferred or deposited in bank accounts abroad. There are also limits on the amount of cash (in local and foreign currency) that may be carried when travelling to and from Argentina.

9

Taxation

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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 your jurisdiction? 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? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest?

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 cases where 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. 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 cases where 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.

Income arising from receivables that are publicly quoted or their sale is usually exempted from Income Tax in the case of individuals.

In the case of the sale of receivables at a discount, the discount could be recharacterised as interest and subject to Income Tax withholdings.

9.2 Seller Tax Accounting. Does your jurisdiction 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 your jurisdiction 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 your jurisdiction 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 at a discount, 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 (Act 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 for paying the tax.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, 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 your jurisdiction?

No, not as long as the purchaser does not reside or have 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 such reason, it would probably be more efficient to organise a local vehicle or a trust for the purchase.

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